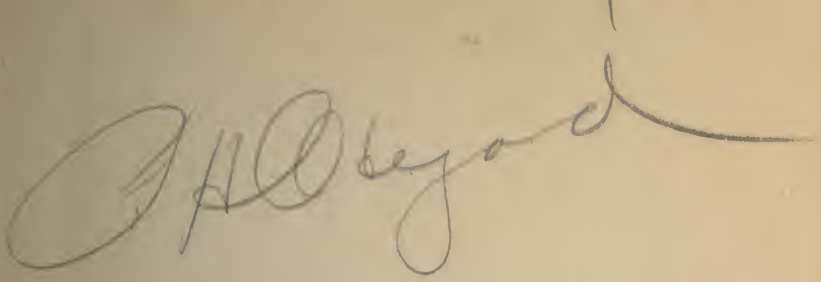
RESPONSIBLE DRINKING

A Discreet Inquiry and a Modest Proposal

By ROBERT C. BINKLEY



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To
W. A. N.

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PREFACE

FIVE HUNDRED YEARS ago, as history relates, the Great Schism divided the obedience of Western Christendom between two rival lines of Popes, elected by two rival colleges of Cardinals. An area almost as large as the United States was confronted by a problem which seemed almost as insoluble as Prohibition. It was then that there was set down in the University of Paris a great chest, into which all the masters, doctors, theologians and scriveners were invited to deposit their written opinions on ways of ending the Great Schism. Thus it is in accord with honorable precedent that in matters of great public concern men should freely toss their opinions into the common stock, there to be culled and sorted, compared and collated, till simplicity emerge from confusion, and light from darkness.

Today there is need for the taking of fresh counsel in the matter of Prohibition. A few years ago we were able to hope that a little more doggedness and patience would suffice to end the liquor problem; today that hope is waning. Something

more than doggedness is required. A few months ago it seemed that any attempt to think out the liquor problem along new lines was vain because of the deadlock of political forces; now that deadlock is broken, and a fresh appraisal of the situation has become imperative. The *Literary Digest* poll has shown that those who are dissatisfied with the present state of things are so numerous that if they were united upon a common program they could impose their will upon all lawmaking bodies, and modify the Federal Constitution itself. But none of the proposals now actually before the people seems likely to serve as a basis for such united action.

In this essay the attempt is made to explore the field of the liquor problem while remaining uncommitted to the doctrinal system of either Wets or Drys. And the conclusion is suggested that the elements necessary for the solution of this question are already in existence, unperceived, in our present institutions.

PALO ALTO, 25 JULY, 1930.

RESPONSIBLE
DRINKING

I

A Legacy of Tumult

To THE HISTORIAN of the future it may appear as either a great tragedy or a great comedy that the American people at a critical moment of transition such as the present could find no subject more worthy of their attention than the problem of a liquor regime. It is a great misfortune that American opinion should be distracted by the liquor question at a moment when problems of foreign relations and industrial organization ought to be receiving the benefit of all the political wisdom at our command. It is a further misfortune that our thought on this question is governed by a legacy of emphasis on Prohibition, the product of a movement that has come down into the twentieth century with the fuzz of the 1830's about its ears.

The liquor controversy is a conflict between two hardened and self-contained dogmatic systems. The official Dry position differs from the official Wet position on questions of organic chemistry, dietetics, pharmacy, biology, religion, psychology, jurisprudence and political philosophy, as well as on the interpretation of statistics on economic conditions. The rivalry between these two systems, each of which is seeking with evangelical zeal to indoctrinate the people, now threatens to paralyze our most promising political enterprises and to handicap with the dead weight of popular indifference the most necessary movements of social reform.

If we wake up some time to find that our social organization has developed a new feudalism, or that our bungling of foreign affairs has brought us to a world war, we will have to compare ourselves with those populations of the decadent Roman Empire which, while their civilization dissolved about them, resorted to riot and civil strife to prove that the Deity was *homo-usian* rather

than *homoi-usian* with Christ, or that the Divine and Human in Jesus were formed in one nature rather than in two.

What prospect is there that the period of darkness will soon be ended and the liquor question brought to some kind of equilibrium in which it will cease to be the major political distraction of the country? What kind of victory by Wets or Drys would suffice to take the issue out of the forum and put it on the shelf? This is a vital question which partisans on both sides must answer, for unless they can answer it they must be reckoned as irresponsible agitators rather than as statesmen.

If a neutral observer, unpledged to the doctrinal system of either camp, analyzes the program of the Drys and the numerous programs of the Wets, he finds that none of them can meet this elementary test. Both parties are fighting for the adoption of policies the consequences of which they have not thought through to the end. Both sides are the helpless victims of a legacy

of error. The Prohibition program was not a product of enlightened statecraft, not a careful adaptation of means to end, like, for example, the Federal Reserve System. It was a program defined by a greatest common denominator of enthusiasm and a least common multiple of intelligence in the American housewife and the American clergyman, neither of whom was trained in the social sciences. The generation which formulated the liquor question as an issue in criminal law was not cognizant of the real intricacy of the problem of social control to which it addressed itself. And the issue formulated in this haphazard way determined not only the attitude of the Drys but that of the Wets as well.

The Prohibition issue is a legacy handed down to us through four generations of earnest American agitators. If you would see the social atmosphere in which the issue took form, go to Tocqueville's great essay on *Democracy in America*, where one of the keenest minds of the nineteenth century analyzes the United States of the 1830's.

"No sooner do you set foot upon American ground than you are stunned by a kind of tumult; a confused clamour is heard on every side; and a thousand simultaneous voices demand the satisfaction of their social wants. Everything is in motion around you; here the people of one quarter of a town are met to decide upon the building of a church; a little further, the delegates of a district are posting to the town in order to consult upon some local improvements; in another place the farmers quit their ploughs to deliberate upon the project of a road or a public school. Meetings are called for the sole purpose of declaring their disapprobation of the conduct of the government; whilst in other assemblies, citizens salute the authorities of the day as the fathers of their country. Societies are formed which regard drunkenness as the principal cause of the evils of the state, and solemnly bind themselves to give an example of temperance . . . *If an American were condemned to confine his activity to his own affairs, he would be robbed of one-half of his*

existence; he would feel an immense void in the life which he is accustomed to lead, and his wretchedness would be unbearable."

Tocqueville noted, further, the tendency of this nation of busybodies to turn constantly to the legislature for new laws on all subjects: "A single glance at the archives of the different States convinces me that the activity of the legislator never slackens." And he recognized the danger to the future in a state of things in which the majority had such unlimited power that "no obstacles exist which can impede or even retard its progress, so as to make it heed the complaints of those whom it crushes upon its path." He observed, moreover, that the majority "claims the right, not only of making the laws, but of breaking the laws it has made."

"I said one day to an inhabitant of Pennsylvania: 'Be so good as to explain to me how it happens, that in a State founded by Quakers, and celebrated for its toleration free Blacks are not allowed to exercise civil rights. They pay taxes. Is it not fair that they should vote?'

"'You insult us,' replied my informant, 'if you imagine that our legislators have committed so gross an act of injustice and intolerance.'

"'Then the Blacks possess the right of voting in this country?'

"'Without doubt.'

"'How comes it, then, that at the polling booth, this morning, I did not perceive a single Negro in the meeting?'

"'It is not the fault of the law; the Negroes have an undisputed right of voting; but they voluntarily abstain from making their appearance.'

"'A very pretty piece of modesty on their part!' rejoined I.

"'Why, the truth is, they are not disinclined to vote, but they are afraid of being maltreated; in this country, the law is sometimes unable to maintain its authority, without the support of the majority. But in this case, the majority entertains very strong prejudices against the Blacks, and the magistrates are unable to protect them in the exercise of their legal rights.'"

This was in 1831. We did not need to wait for the Civil War and the Fifteenth Amendment in order to initiate the policy of nullifying by administration what we had done in legislation. The

whole machine of agitation, legislation and nullification was set up and running in Tocqueville's time, and the prohibition platform was some of the grist of its grinding.

That the program of liquor control formulated in the era 1830-1840 should be suited to the America of 1930-1940 is not intrinsically more probable than that Jackson's policy toward the National Bank would afford a model for our present treatment of problems of stock-market speculation and farm relief. The liquor program was stated in the beginning with a certain hyperbole of diction, a preoccupation with biblical illustrations and criminal law analogies which were inevitable in the 1830's, but are out of step with contemporary ways of thought. The sermons preached on the subject ninety years ago do not betray their date. Here is an example:

> "The distiller, wholesale and retail dealers, know that they are engaged in a body and soul destroying business, and are virtually ruining their fellow creatures by wholesale: the beam cries out against the timber, and the stone against the wall. . . .

"I can hardly let moderation be known when I reflect upon this subject. What! License men to deal in liquid fire? *Alcohol?* That is destroying *thirty thousand men,* made in the image of God, every year.

"With equally as much propriety, might they license men to furnish themselves with daggers, to thrust into the heart of every man who they suppose may be possessed of a four-pence-half-penny.

"The only apology that can be made for licensing men to sell intoxicating drinks, is, that the law, regulating the sale, was formed at a time, when the community thought they were useful as a drink, at least when moderately used. But thank God, *that* day has passed by, and the community, not only sees the subject, as trees walking, but clearly; and instead of aiming, only to bark up the tree of intemperance, and to crop off its branches, they are aiming at the root, and if they persevere they will destroy the root with all its branches."

This sermon, preached in 1841, might equally well have been preached in 1918. Were it not for the antiquated punctuation which inserts more commas than a modern stylebook would permit, one might well take it as an excerpt from a recent

speech on the subject. All the principal elements of the doctrine of Prohibition were present a century ago, and have not changed materially since that time.

These clergymen of the 1830's had a grievance against the liquor industry, which their habits of thought did not permit them to formulate in any other way than as a demand that liquor-selling be made a crime. They were familiar with no juridical technique for limiting the exercise of property rights; they had such confirmed respect for absolute rights in private property that nothing less than criminality seemed to them an adequate cause for invading the prerogative of the individual to buy, to sell, to own and to possess whatever he would. The idea of peculiar kinds of property invested with a public interest and subject to public control was not taught to the people till the age of railway and monopoly politics of the last quarter of the century. Even the kind of attack on absolute property rights which an employer's liability law contains, in that it compels

an employer to pay for something not his fault, was strange to this generation. If there was something about the liquor industry which distinguished it from other enterprises, the good clergymen could only assume that it must be a criminal trait, to be illustrated by the analogy of the assassin licensed by law to use a dagger. Modern social science could easily provide more illuminating parallels to illustrate the relation of the liquor industry to society. But the problem was not set up as a problem in social science until long after the preachers had dictated what the answer must be.

The intellectual equipment of the age which formulated the Prohibition platform was deficient not only on the side of the social sciences; its knowledge of the natural sciences was also far inferior to our own. The doctrine that drinking is harmful even in moderation entered the theology of Prohibition at a time when medical science was still permitting blood-letting as a cure for fever and sending consumptives to kill themselves by a

regime of starvation and violent exercise. The official Prohibition view of the effect of alcohol on the human body was thoroughly articulated before Liebig had founded the science of organic chemistry, and before there was either a theory of cell structure or a technique for the study of metabolism. With respect to pedagogy, the dictum "spare the rod and spoil the child" was orthodox doctrine when the Prohibition crusade began. A century of intellectual progress which altered and expanded our knowledge of alcohol, human nature, and society did not alter in the slightest the program that was already being preached when de Tocqueville visited these strange shores.

It is possible that the Prohibitionists of 1840, with supernatural prescience, hit upon the one best liquor policy for their great-great-grandchildren to adopt. But the question of the aptness of the solution in modern life is difficult to discuss because the debate now runs in a rut worn with a century of dubious assertion and reply. The new facts as they have come to our knowledge, the

new conditions as they have made themselves felt, have been given their place in both arguments. The automobile is held to make Prohibition at once more necessary and less enforceable; the new psychology affords to the Wets new reasons for regarding the moderate use of liquor as desirable, and to the Drys a new basis for doubting whether such a thing as "self-control" can be trusted to prevent harmful excess.

All the proposals now actually before the public, whether they emanate from Wet or Dry sources, are formed either positively or negatively by the Prohibition model. You may have either Prohibition or a substitute for Prohibition; take your choice! What you cannot have is a policy or attitude toward liquor, freely thought out on the basis of contemporary knowledge and present-day facts, unprejudiced by a legacy of emphasis upon this one particular device which our good forefathers thought would solve the liquor problem. This is what they must mean who say that Prohibition is not a policy but a predicament.

Were it only possible to clear the ground and attack the whole problem afresh, who knows what the result would be? Surely it must be possible to formulate some attitude toward liquor upon which the people of America would be more likely to reach contented agreement than on either the Prohibition or anti-Prohibition proposals now before the country. For it does not appear that either the Wets or the Drys are at present equipped with a liquor program which will bring an end to the agitation, quiet the turmoil, and permit the country to devote its attention to more important things.

II

Enforcement

WHAT WOULD HAPPEN if Prohibition should finally be made to prohibit? The Drys envisage this prospect with the vague exaltation of a middle-aged spinster dreaming of her marriage. With grim determination they demand enforcement. But beyond enforcement—what then?

Have we any reason to hope that if the Prohibition law is once enforced, the country will accept the situation and turn its mind to other questions? Is there any prospect that "effective" Prohibition will solve the liquor problem definitively? The Wets are insincere when they utter the objection that "Prohibition does not prohibit"; if it did prohibit they would love it even less. The Drys are superficial when they devote

all their thought to devising measures of enforcement without taking into account the place of enforcement in the total social and political life of the country. They run the risk of paying for success with failure, and of enforcing the law only to see it repealed by an exasperated public.

It is difficult to guess just how much of a reign of terror would be necessary in order to bring about complete enforcement. Certainly the cost would be great, both in money and in strain upon the political system. But despite these great costs, if the Prohibitionists can maintain their voting majority, it is not impossible that they may render the law effective. There are in human nature a great many cheap or contemptible traits which will contribute to their success. If it becomes a little dangerous to buy liquor many buyers will retire from the market, for the great majority of men are lacking in courage; moreover, those who do not dare to drink will not care to see others enjoy what they are too timid to take, for meanness and envy lurk in most souls; and when those

who have been frightened out of the market suspect that their neighbors are still buying liquor, they will make efforts to verify their suspicions, for who is there who is content to mind his own business? And when they have verified their suspicions, they will speak disparagingly of their neighbor, for hypocrisy is a sin as common as it is deplorable. It is fortunate for the Prohibitionists that in the economy of human endeavor noble intentions can count on the aid of paltry and despicable ones.

But those who accept the Prohibition regime under this kind of pressure will have none of the qualities of a crusading army. The spiritual strength of the Prohibition movement will not increase with its success, but will rather diminish. The opponents of Prohibition, on the contrary, will find their spiritual strength increased as their grievances become more real.

There will remain many free spirits who, even if they conform to the law, will protest the more violently against it the more completely they see

it enforced. Their voices will be only the more raucous when their throats are dry. And then, when the vigilance of the Prohibitionists slackens, they will form the nucleus of another mass of systematic violators of the law. Nobody can say with any confidence how numerous this remnant of the unconverted will be. The straw vote in Kansas—two thousand out of ten thousand ballots cast for repeal—indicates that this remnant can resist a long regime of enforcement. A relatively small number of Wets can serve to keep the Prohibitionists *en vedette*, by agitation when the law is enforced, and by violation when it is not.

So long as Prohibition is taken for granted as the pattern for solving the liquor problems, the tension of forces cannot reach equilibrium, for the winning side does not gather strength, but dissipates it, and the losing side gains cohesion and determination from its loss. *For Prohibition creates no stabilizing vested interests irrevocably committed to its perpetuation.* Most reform projects,

when carried through, anchor themselves quickly in new institutions and new systems of rights. An agrarian revolution protects itself against reaction because the peasants who have taken over the land have, each of them, a direct interest in resisting attempts of the expropriated landholders to recover their lost rights; a political, democratic revolution tends to protect itself because those who have gained the right to vote will not be willing to give it up; the emancipation of the slaves resulted in the setting up of new political and economic relationships which make the return of slavery in its old form impossible. But with Prohibition the principal vested interests, definitely and immediately committed to its perpetuation, are precisely those which serve best to keep the question in a state of agitation: they are the interests of the bootleggers, the professional anti-saloon organizers, the relatives of drunkards, and the personnel of enforcement. And no matter how long Prohibition continues to be the regime of the country, its institutional equipment will be at the

end exactly what it was in the beginning, a body of officials sniffing for alcohol and armed with the right to prosecute under the criminal law.

When the Wet tells the Dry, "It is none of your business what I eat or drink," he is pointing to a fact of fundamental importance in the solution of the liquor problem (though for reasons which he may not intend). He means to imply that the Dry regime violates his rights, and this is important from the individual standpoint. From the social standpoint the observation is equally significant in another way, for it means that the Prohibition regime does not give the Dry any rights that will be injured if the Wet drinks liquor. Since the Dry does not obtain a vested interest that makes it his business what his neighbor eats or drinks, the liquor reform tends to be unstable. Men feel that they have an interest in the punishment of robbers and murderers, because they fear that they may sometime be robbed or murdered. But they have not the same kind of interest in seeing bootleggers punished, because

they are not injured by another man's liquor purchase. In the absence of any deeply committed interest in the other man's diet, the motive force to drive the Prohibition machine must be sought elsewhere.

Contrast, from this standpoint, the liquor question and the question of capital and labor. In trying to solve the intricate problems of the relation of employer to employee one can count on the existence of stable and well-recognized interests on both sides. The employer does not say to the employee, "It's none of your business what I pay you," nor does the workman say to the boss, "It's none of your business what work I do." But the problem of liquor control, when formulated as the Prohibition issue, must depend on the unstable forces of humanitarianism, intolerance, fanaticism and sentimentality, which live best in an atmosphere of perpetual agitation. They are powerful forces, as the history of the whole movement shows only too clearly, but they are not stabilizing forces unless they can succeed in estab-

lishing some institution which will perpetuate itself without them. Had the motives in the experiment been less noble they might have been more effective.

There are indeed certain relationships within which it does become "the business" of one person what the other may eat or drink. Wives accept this responsibility towards their husbands and children. The food and drink and morale of the family are a part of their immediate concern. Some parents believe that their children will form the most desirable character if they are never exposed to liquor; some wives have drunkard husbands in whose interest they demand that all opportunities to drink be closed. These wives and parents are the persons in whose names the most effective liquor agitation is maintained. No one knows just how numerous they are. The spokesmen of certain Prohibitionist organizations sometimes imply that the entire female population of the United States lives in fear that every husband or child would be a drunkard if given the chance.

If this were true, there would be a much more effective power harnessed to the machinery of Prohibition than is now manifest.

These people who have an immediate personal interest in the maintenance of the Dry regime, whether they are many or few, are the stuff of which irreconcilables are made. Though the success of enforcement will dull the edge of their interest, their sense of grievance will become active again as soon as the Wet attitude begins to prevail in legislation and administration. There are irrepressible Drys just as there are irrepressible Wets. Because of them a victory of the Wets would result in no greater stability than a victory of the Drys.

The history of liquor legislation, not only in America but in other countries as well, confirms the prediction which could be made upon the basis of the principles here stated, that when the issue of liquor control is formulated as a Prohibition issue, the policy of the country will tend to move backward and forward between two extremes.

America passed through one such cycle of Prohibition in the period 1850-1870, and the Scandinavian countries are playing the same game in the same way. Is there no issue from this perpetual round of agitation?

It is part of the philosophy of Prohibition that the final triumph of the cause, the definitive solution of the liquor question, requires that there should come into being an unsullied generation which would regard drinking as a moral perversion and the purveyor of liquor as a felon. Until this attitude becomes so general that those who defend liquor are as rare as those who defend murder, forgery or the use of cocaine, liquor legislation will not have passed through the transition stage, and we are doomed to continue to swing back and forth from one extreme to another. Will ironclad enforcement be likely to produce this generation of hardened total abstainers, and will such a generation, if it should come to be reared, pass on its attitude unchanged to its descendants, like an entailed estate?

The present enforcement policies, as newly drafted by Director Woodcock, even if carried out completely, will still be far from the attainment of this ultimate objective. The new Director has announced his plans to the public: there are to be five hundred new agents, daily reports of arrests, schools for Prohibition officers, a division of research, a policy of courtesy toward the public, restraint in the use of firearms, and a concentration of effort upon big commercial violators. "I will not have our agencies following the course of least resistance and wasting their time upon pitiful picayunish non-commercial cases. I think the Prohibition laws can be successfully enforced against commercial violators. I propose to make that our objective, and not to dissipate our energies in other fields." These policies have been approved by the Anti-Saloon League and the Methodist Board of Temperance and Morals. But these are not bone-dry policies. Even if they are carried out one hundred per cent, they do not bring into being a race of men uncorrupted by

wine. To get rid of the commercial violator does not dispose of drinking, nor of the drinkers' appetite.

Let us assume, nevertheless, that this generation of hardened total abstainers is actually reared and that the future is given over to its hands? Can we hope that its attitude will be passed unchanged from generation to generation like an entailed estate?

The cycle of the generations turns quickly, and often it is only necessary for the elders to approve of something in order that the youth come to disdain it. In Europe, the first generation of the nineteenth century despised the French Revolution and all that it had stood for; the next generation adored what its parents abhorred. There is today in the young people who are coming of age a reaction toward decorum and away from the libertinism of the preceding age group which was so notoriously demoralized by the war. A generation of total abstainers, if it were produced, would not automatically transmit its trait to those who

would come after it. On the contrary, it would be quite likely to see its offspring evince a strange curiosity to know liquor as an experience rather than as a legend. The Dry regime would have enough stability to perpetuate itself only under conditions of life—such as those obtaining on farms and in villages—where the young people are under the effective supervision of their elders. The trend of American population toward great cities is making this situation the exception rather than the rule. Consequently we cannot reasonably hope that Prohibition, once made effective, would continue without agitation as a permanent and definitive regime.

A generation brought to maturity without having been given the opportunity to drink will have been denied the equally important opportunity of refusing to drink. It will harbor no grievance against the liquor industry; it will have only the vaguest ideas of what must have been meant by the saloon evil; it will be slow to participate in the belief, in which its parents were indoctrinated,

that a millennial perfection will pervade society when liquor is effectively banned. It will be much less rigidly steeled against temptation than were the thousands upon thousands of good Methodists and Baptists who changed their ideas about wine while fighting for democracy in France. It will be as easily subject to "demoralization" by exposure to liquor as were the savages to whom the traders brought the gift of fire water.

Nor will it be possible to keep this generation of innocents from temptation, no matter how effectively we police the cellars of the country. To imagine that these young people can be kept in complete and blissful ignorance is to forget the constantly increasing intercourse between America and the other parts of the world, and to believe that the whole nation can return to the provinciality of thirty years ago. Nearly half a million Americans went abroad in 1929; the number increases yearly, and the organization of American economy as regards shipping and export trade is dependent upon this mass pilgrim-

age. The maintenance of our position in world affairs requires a generation of men familiar with the world. Our floating universities and travelling fellowships testify that our cultural growth, no less than our economic order, demands these foreign contacts. We cannot expect these Americans who go abroad to believe that drinking as they will know it in Europe is a sin.[1] The more effectively they see Prohibition laws enforced in America, the more illogical and unsound these laws will appear to them. While the prisons are converting people to Prohibition, the steamships will be converting them to the opposite view. Conversion by foreign travel will be especially frequent among the very class of citizens who are most influential. Even a few of them would be able to maintain agitation. But they will be many, and their voices will be joined with those of the

[1] Note, for example, the new French tourist bargain offered under Government auspices to Americans, viz: one hundred dollars for a fifteen-day ship to ship tour in France, *including wine,* an offer which High Commissioner Gerard seems to have evolved with the *arrière pensée* of helping to pry open once more the American wine market.

unconverted who have remained at home. The definitive solution of the liquor question by Prohibition will then require, not only enforcement in America, but the imposition of the regime on the rest of the world, or the placing of heavy restrictions upon traveling abroad.

At this point a permanent Prohibition settlement becomes fantasy. The Communists demand that their system be extended to the whole world in order that it succeed in one place; the Tokugawa Shogunate sealed up the nation from contact with the rest of the world in order to protect it from the dangers of Christianity; the Tsin Emperors of China ordered the burning of all the books in the realm in order that memory of things contrary to their policies should be extinguished. Such measures as these would be required of a Prohibition enforcement policy that would permanently protect itself from a relapse, or from disturbing agitation.

III

Nullification

If the balance of forces between Wets and Drys is such that the Drys control legislation, but cannot capture administration, the result which automatically follows is the nullification of the law. This, as was noted by de Tocqueville in 1830, was a standard American practice when the Prohibition program was formulated. There is some evidence that the legislator has often acted in matters of liquor legislation with the *arrière pensée* that the blow of a severe law will be softened by laxness of administration.

The experience through which the country is now passing has called attention to the phenomenon of the nullification of law, and given currency to the aphorism that disrespect for one law leads

to contempt for all. This aphorism is equally useful to the Drys, who argue that unrepealable laws should be enforced, and to the Wets, who argue that unenforceable laws should be repealed. It was given expression in President Hoover's inaugural address:

> "Our whole system of self-government will crumble either if the officials elect what laws they will enforce or the citizens elect what laws they will obey. The worst evil of disregard for some laws is that it destroys respect for all law."

On the other side of the argument there is a body of opinion which looks to nullification to accomplish the solution of the Prohibition problem. One party fears nullification as a menace to government; the other party welcomes it as a device for ending the agitation of the liquor problem. But there is good evidence that both views are ill-founded; that nullification, far from being a menace to our system of government, is actually a part thereof; and that the Prohibition question, far from being solved by nullification, will only be aggravated thereby.

Nullification, as Part of the Legal Process

The theory that self-government is doomed when officers and citizens decide which laws are to be enforced is based upon a discredited view of free government: the doctrine of the separation of powers. This doctrine is a relic of eighteenth-century rationalism. It originated in Montesquieu's misunderstanding of the government of England. It has no roots in our history, but only in a foreigner's misconception of our institutions. It was a fashionable political dogma at the time the American Constitution was drawn up, but it was not then, and is not now, realized in the actual working of local government in Anglo-Saxon countries. And in these the local government takes care of most of the enforcement of criminal law.

According to the theory of the separation of powers, people can be assured of self-government only when their officials enforce blindly whatever laws their legislatures enact. There is no short

circuit allowed from people to administration. The popular will must be expressed through the legislature or not at all.

If this bookish doctrine were true, the only units of population that could make their will felt in public affairs would be those that happened to have sovereign legislative bodies. The smaller units, which take care of the enforcing of the law, would have only as much room for choice as the sovereign specifically allowed them. The law expressed by the legislature would be the "command of the sovereign," and aside from specific delegations of powers, there would be no elasticity or local variation in carrying out the sovereign's commands.

But the government that lives outside of books takes its course without much regard for the metaphysical thing called sovereignty or the precious distinction between legislation and enforcement.

Everyone knows that in American politics law-enforcement policies are openly voted upon in municipal elections. If the party that advocates

strict law enforcement is defeated at the polls, those who are elected to office have a mandate from the voters to nullify certain of the laws enacted by the sovereign legislative authority. This control of the policy to be followed by local officials is an inherent part of the total legal and political process.

Prosecuting officials are equally sensitive to local pressure. In Kansas City, they obtain convictions in one-third of one per cent of the cases of arrest for liquor-law violation; in the rural districts nearby, they convict twenty-five per cent of the persons arrested. The judges in one region sentence a Prohibition offender as if his crime were as serious as forgery; elsewhere they treat him like a careless motorist. All this goes on openly, the judges announcing in advance what punishments they will inflict. And back of all these permanent officials, there are the temporary instruments of enforcement, the members of the juries and grand juries. If they refuse to indict and convict, enforcement is impossible. The

command of the sovereign goes unheeded.

From the standpoint of the abstract doctrine of the separation of powers, this margin of local freedom is no doubt a deplorable anomaly. From the point of view of the doctrine of sovereignty, it is an inexcusable usurpation. But, actually, these practices conform to the great tradition of Anglo-Saxon self-government. Through all the changes that have marked the political path of the Anglo-Saxons from the tribal period to the present, local independence in applying criminal laws has prevailed.

In the early Anglo-Saxon times each community defined its own law. The king administered justice in a limited class of cases, but it was the local law that governed these cases. By the law of Berkshire a murderer forfeited life and substance; by the law of Urchenfeld he was fined one hundred and twenty shillings. At Lewes the crime of rape was compounded for eight shillings fourpence; in Worcestershire it could not be compounded. When, in a later century, Henry

II sent his justices through the land they would inform themselves of the law of the locality, and would base their decisions upon the information they received. Later the royal judges built up a system of law that was common to the whole realm; this was the Common Law of England. But local autonomy was not thereby extinguished; from autonomy in defining the law it passed over to autonomy in enforcing it.

In the days of Queen Elizabeth law enforcement was in the hands of the country gentry. From this class were recruited the Justices of the Peace, "full of wise saws and modern instances." Shakespeare knew the type. They enforced as much or as little of the law as they saw fit. If they happened to be strict Calvinists they might even go beyond the law in trying to force the people of their districts to conform to the Calvinist virtues. They would fine the villagers for shooting at the butts on Sunday. The good Queen would write letters of protest, but she had no way of compelling uniform law enforcement. The local

authorities simply nullified the laws that did not please them. This willingness to nullify law came to America in the Mayflower.

In colonial times the Navigation Acts were unenforceable in America, the region for which they were intended. Smuggling ranked with other commercial enterprises as an eminently respectable, as well as profitable, occupation. Public opinion sided with the smuggler. Attempts to enforce the law broke down because the local government authorities held the key positions. This story has been repeated again and again in the history of our country. Tocqueville saw the system in operation in 1831. As it was with the Fugitive Slave Law in the North before the Civil War, so is it with the Fifteenth Amendment in the South since Hayes' administration.

The autonomy of local government in matters of criminal law has not only survived the change from a law-defining to a law-enforcing function; it has also weathered the transition from the old Anglo-Saxon system to Norman feudalism, from

feudalism to squirearchy, and thence to modern popular government with its organized party politics. In the light of this historical perspective it would appear that the only state wherein local nullification menaces self-government is the one that exists in university classrooms alone. Local discretion in enforcing laws is more clearly a part of our system of self-government than the doctrines of the separation of powers and of sovereignty, in whose names it is condemned.

From the doctrinaire point of view one might still argue that these local variations are to be regarded merely as violations. This raises the question of the distinction between nullification and violation. What is the law, after all, and how can it cease to be law? If in the state of New Jersey the law against larceny is violated, and at the same time the Prohibition law, or Sunday theatre law, is disregarded, the doctrinaire will lump all of these offenses together as law-breaking. In assuming this attitude he deliberately ignores all the elements of the legal situa-

tion except the formal facts of statutory enactment.

For the doctrinaire, though he may not know it, believes in the Austinian theory of law. That is to say, he thinks of the law as the command of a sovereign, and of the sovereign as a determinate organ of the state. The Austinian theory patterns a general definition of law upon the model of the most recent and superficial kind of law—the statute.

As against the Austinian conception, there is the view that law is a product of the internal development of the community, a function of its culture in which the essential element is consensus, not command. According to this more natural and general view the statutory enactment is only one among many ways in which law is expressed and defined.

The history of law, not only in Germanic lands, but in all places whose legal history is known, shows that the earliest law was based on custom, and was thought to be something that no human

agency could alter. The legal system was kept up to date by forgetting old laws and remembering new ones into existence. There was no sovereign, no determinate organ, no command.

The invention of writing interfered with this automatic legal system by making it more difficult to forget old laws or unconsciously introduce new ones. When the law was once written down innovations became conscious. Outright legislation came to be practised. The consequent revolution in our way of thinking has gone so far that we now look to new law to accomplish just those miracles of beneficence that our ancestors expected of the "good and ancient customs of the realm." While our legislatures grind out volume after volume of new laws, we continue to exclaim of this or that inconvenience, "there ought to be a law about it."

The invention of legislation, however, has not killed the original habit of forgetting an inapplicable law and developing a new consensus as to what is right or wrong. These processes still form

a part of the living legal system. There are whole classes of unrepealed statutes which are so obviously obsolete that any attempt to enforce them is regarded as freakish. A grand jury in Elizabeth, New Jersey, refused to indict a theatre owner who was clearly guilty of violating the Sunday closing law, on the ground that "a change in conditions and customs makes the present law governing the moral life on the Sabbath more or less obsolete."

The doctrinaire view of law breaks down when confronted by three important kinds of statutes. Some are obsolete; others are opposed by the consensus of opinion in certain communities within the jurisdiction of the legislature which enacted them; and others are enacted without intention on the part of the legislators that they are to be enforced. With laws of these three kinds the problem of nullification arises. And in each case the Austinian doctrinaire would claim that the statute is the law; while the student of the practical workings of our jurisprudence would ask whether

the statute is actually expressive of the existing law.

To identify nullification with violation of the law is artificial from the standpoint of jurisprudence; from the standpoint of psychology, it is absurd. The statutes that are nullified by obsolescence, local opposition, or lack of serious legislative intent are not confused in the minds of citizens with the living body of the law. If the community is regularly and wilfully disregarding a law, the most casual conversation of the citizens reveals that the particular statute is distinguished from, not confused with, other elements of the legal system.

With statutes of this type there is no evidence that disrespect for law is transferable from one law to another. The mountaineer who shoots deer out of season does not drop into hog-stealing, nor does the average citizen who carries a hip-flask condone such offenses as arson, highway robbery or rape. In fact, if the provisions of the penal code relating to these offenses were repealed, the

citizens would continue to regard them as crimes, and would probably devise extra-legal means of preventing them.

The violence that characterizes the bootlegger's trade does not arise from a moral indifference leading the bootlegger to confuse in his mind the crime of murder and the crime of transporting alcoholic beverages. The violence results merely from the failure of the government to protect an industry that is outlawed by statute. The industry reverts to primitive self-help to protect property rights that cannot be defended in the courts or guaranteed by the police. It was not against the police that the gangsters armed themselves and developed their iron code. Their organization gives a rough and bloody substitute for law in a region from which the law has withdrawn.

The Prohibition statute did more than create a new class of crimes; it abolished an old one. It made it illegal to sell, but practically unpunishable to steal, the forbidden liquor. The informal organization of the community then made com-

pensation for the vagaries of the statute. Liquor larceny is still resisted and visited with punishment, though not by the police; the sale of liquor is still permitted, though not by the legislature. The speakeasies of New York often have signs tacked up behind the bar: "This place is insured against theft and dishonesty."

Just as the Volstead Act legalizes deeds that the community continues to regard as theft, so the Jones Act sanctions deeds that the moral sense of the citizens continues to condemn as murder. By increasing the penalty for liquor-law violations, the Jones Law automatically puts the suspected liquor-law violator into the class of the suspected felon. An officer who witnesses the commission of the felony of transporting liquor—if only in a hip-flask—acquires at once the technical rights over the person of the offender that would be acquired by an officer who witnessed a burglary. If the felon flees, refusing to halt when called upon to do so in the name of the law, the officer may kill him. The law will describe the deed as

justifiable or excusable homicide. It may happen that the victim flees because he wrongly believes the pursuing officer to be a thug. Even this circumstance may not make the homicide a crime. But such acts, though legalized by statute, will be resented by the community as if there were no statute. A community terrorized by repeated outrages of this kind would probably develop such a temper that juries would acquit persons who killed Prohibition-enforcement officers, or the offending officials might be subjected directly to mob vengeance. Fortunately, the adjustment of law enforcement to public sentiment takes place by way of the autonomy of the local community, and nullification of the statute. The legislature cannot really give effect to its formal act to legalize murder, any more than it can make effective its enactment to legalize theft.

Judge Louis Fitzhenry, of Peoria, Ill., contributed to clear thinking on this problem when he declared on November 22, 1929, that "anyone knowing of a friend, relative or neighbor possess-

ing liquor in violation of the Jones law," unless he reports his knowledge to the proper authorities, is himself a felon under a statute of 1790 which makes a felon out of anyone failing to report a felony. Certain distinguished Drys, notably Senator Sheppard and Dr. Clarence True Wilson, were reported to be "enthusiastic" about Judge Fitzhenry's discovery. But it is a discovery which reduces the doctrinaire view of the criminal law to an absurdity. Imagine a corps of officials who should try to carry out President Hoover's advice by punishing all felons, indiscriminately, whether their felonies were defined by the Jones Law or the law of 1790! A fantasy, of course, but an instructive fantasy. Such action would tend much more to the destruction of our system of government than to its maintenance.

This experience with Prohibition seems to demonstrate that there is something in the nature of law that a log-rolling legislature cannot touch by means of a statutory enactment. But the doctrinaire will still bring forth the objection that if

everyone chooses which laws he will obey, the consequence is anarchy.

This is another of the objections based upon fiction—in this case, a fictitious notion of human nature. For human beings are not rational atoms, each utterly independent of the other and capable of entertaining any view, believing any doctrine, upholding any cause, that a speculative mind might invent for him. The opinions of men cannot be plucked up arbitrarily from their deep background. The same resistance that is offered to an unconsidered legislative act will also check these supposed attempts towards an anarchistic choice of laws to be obeyed or ignored.

The problem of law enforcement is so serious that we cannot afford to let our thought upon it derive from discredited doctrines of politics and law, or from fictitious notions of human nature. The claim that disregard of one law induces contempt for all is misleading both as to the nature of law and the facts of human behavior. Just as the logicians of Galileo's day argued that there

could be no mountains on the moon since the moon was a heavenly body, the heavenly bodies were perfect, and the form of perfection was a sphere, so the contemporary doctrinaire contends that there is no such thing as justifiable nullification, since the law is what is enacted by the legislature, the legislature is the voice of the sovereign, and the sovereign cannot be guilty of self-contradiction.

No wise or practical policy is likely to arise from a theory that does not take account of justifiable nullification as an inherent feature of the total legal and political process. But on the other hand, it does not appear that nullification is a practical and efficient way of ending the controversy over liquor policy.

Why Nullification Will Not End the Controversy

For there are special reasons, operative in the case of Prohibition, which render it unlikely that nullification will bring the liquor question to

equilibrium. For nullification quiets a question only when the dominant political authorities are all of one mind with regard to it. This is the way the nullification of the Fifteenth Amendment is carried on in the South today. It was the way the Negroes were deprived of their franchise in Pennsylvania a hundred years ago. But in most parts of the United States nullification will not put an end to Prohibition agitation because the Wets and Drys are not sufficiently segregated from each other. There are cities and states in which Wet sentiment is overwhelmingly preponderant, and in these nullification has a chance of ending controversy so far as local politics is concerned. But most communities contain a mixed population. This much, at least, was proved by the *Literary Digest* poll.

To solve the liquor problem by nullification is therefore not unlike trying to solve the nationalities problem by drawing new boundaries. No frontier can be drawn that will put all the Hungarians on one side, all the Rumanians on the

other. Only the drastic measure used after the Greco-Turkish War—the exchange of populations—would render nullification a satisfactory solution. If the Wets should be segregated in certain states, and the Drys in others, there would result a situation in which the Eighteenth Amendment in the Wet state could be treated as the Fifteenth Amendment has been in the South.

We have also in prospect a kind of nullification which will exempt certain social classes from the operation of the law, while requiring other classes to obey it. Country clubs often have good bars though the nearby villages be dry. The liquor laws of the South are both in practice and intention directed against consumption of liquor by Negroes, not whites. Had it not been for the Fifteenth Amendment, the South would have passed laws making it a crime to sell liquor to a Negro, as it is a crime under Federal law to sell it to an Indian living on a reservation. Out of formal respect for the Fifteenth Amendment, the legislation had to take the form of general

Prohibition, although it was intended that enforcement would discriminate between whites and blacks. Thus the Fifteenth Amendment helped to bring on the Eighteenth Amendment, and the gulf between legislation and administration of law was made wider.

This type of nullification, which was expounded by Senator Blease when he declared that his constituents expected him to vote Dry and drink Wet, and that he would do as they expected, is practicable only in places where the privileged class is in complete control of the machinery of government. Elsewhere it encounters obstacles similar to those which face regional nullification. Agitators will protest and bring it about that the clubs of the wealthy are raided and the cellars of the country estates are searched. The interception of supplies destined for the poor will embarrass the bootleggers who are catering to the rich. The kind of class rule which would permit discriminatory nullification is unstable save in the South.

IV

Referendum and Modification

If neither enforcement nor nullification promises to put the liquor question on the shelf, what can be said of the series of proposals for modification of the law now brought forward by the Wets?

The proposals of the Wets fall into the following logical order. First, there is the demand that the liquor policy of the nation be reviewed, the instrument of the reconsideration being usually the referendum or plebiscite. Second, it is proposed that the control of liquor policy be shifted from the national to the state or local authorities. Third, it is urged that the scope of the Prohibition law be altered or definitely interpreted to permit manufacture, but not sale, of fermented

beverages—that is to say, home brewing. Fourth, it is demanded that the sale as well as the manufacture of beverages be permitted, but under restriction either as to the type of beverage (light wines and beers) or the quality of the dealer (government sale, or sale by private monopoly under government grant).

These measures include, in principle, all the proposals of modification now before the people. Do any of them promise to end the controversy? So much effort is now being spent by the Wets in facing the merely tactical problem of how to accomplish any modification whatsoever, that there is a tendency to ignore the great strategic question of devising a regime which would finally solve the liquor problem for all parties. Are not all of these measures of modification like so many devices for harnessing perpetual motion, so many devices for squaring the circle? Are there any of them which promise to put the liquor question to sleep?

Imagine yourself dictator of America for a

day. Say that you had power to change any laws in any of the states, that you could repeal, extend or amend any item of Federal legislation, that you could alter the Constitution itself. Tactical difficulties in gaining votes for this or that measure would not exist for you. Could you, with our present budget of liquor-law proposals, put into the law books any scheme that the whole country would so far accept as to be willing to turn its attention to other problems?

1. *Referendum.* The referendum or plebiscite on Prohibition is, of all these projects, the most non-committal and indecisive. It would determine whether at the moment the majority of the voting population were Wet or Dry. But beyond that it would decide nothing. It is the legislative proposal least compromising to the legislator. It "passes the buck" to the people, but it does not contain the solution of any of the problems of liquor legislation. If it should turn out that a majority of the voters are Dry, the Wets will be deprived of one of their many arguments—the

argument that Prohibition has been foisted upon the people by a minority. But no one is naïve enough to believe that this will reconcile the Wets to the situation in which they find themselves. If, on the other hand, it appears that a majority favors the modification of the law, which of these proposed modifications will answer the needs of the time?

2. *Decentralization.* To give control of liquor policy to state or local authorities, taking it out of the hands of the Federal Government, would shift the forum of the controversy. But how would it change the issues? States or localities which are substantially unanimous for or against Prohibition could, in theory, enjoy a regime suited to their desires, undisturbed by the raucous voice of agitation. But, as the *Literary Digest* poll shows, these communities are few indeed. Not one of the forty-eight states is without a substantial minority ready to protest any decision. Only ten states can show even an absolute majority one way or the other—five for enforcement and five

for repeal. To find those groups in which there is substantial unanimity, one would have to go to the local communities, and even there they would be few enough. But the establishment of a liquor regime on the authority of local communities becomes farcical because of the extreme mobility which the automobile gives to persons and things. In the enforcement of a Prohibition law, the psychological advantages of local option are balanced by technological disadvantages. And from the standpoint of the drinker neither state nor local option can offer him satisfaction if the majority of his state or locality is Dry. It makes no difference to him whether the authority that interferes with his personal habits is the state or the nation. Rather than emigrate from a Dry district he will prefer to agitate, and the prohibitionists will carry on a perpetual campaign to extend their territory by small conquests. The road to political peace does not lie in that direction.

3. *Home Brewing.* The Volstead Act and many

of the state Prohibition acts contain provisions which, under administrative interpretation, are held to give protection against prosecution to the man who makes wine or beer for use in his own home. This is one of the most curious points in the present law. The Prohibition administrators declare categorically that they will not interfere with home brewing, even if the product of the brew should have an alcoholic content higher than that which the law defines as intoxicating. No one is quite sure whether or not this administrative interpretation strains the real meaning of the legislation. But at least home brewing lives on sufferance and would be difficult to eradicate. But the policy of permitting manufacture, while condemning sale, is difficult to justify. If drinking is legal, why compel people to confine themselves to the product of the home cellar when large scale production would give them something better and cheaper?

Certainly there can be no expectation that the legalizing of home brew would quiet the agitation.

Home brew is practically legal at the present moment, and never was the uproar greater than it is today.

4. "*Light wines and beers.*" Let the experiment be made of legalizing the sale as well as the home manufacture of light wines and beers, either by changing the definition of "intoxicating beverage" or in any other way. Then the question will arise: Why stop with wines and beers? The people who are drinking gin and ginger ale, those who are making cocktails according to their fancy, will see no adequate reason for permitting one drink and banning another. Rum punch often has less alcoholic content than wine. People can get drunk on beer and remain sober on whiskey. And the man who knows the art of drinking could never acknowledge the logic of a law that will deny its sanction to so innocent a liquor as Chartreuse or Benedictine. The plea for "light wines and beers" is a political slogan which does not correspond to the real desires or habits of the Wets, and if the principles of it were enacted into

law the battle for full freedom would still go on.

5. *Government sale.* The proposal to permit sale of liquor (whether limited to wines and beers or not) by a public dispensary under government ownership has gained adherents on the very sound ground that it would improve the present situation, and on the very unsound ground that it would work in the United States as well as it works in Canada. The regime would be an improvement over that which obtains at present with respect to the fostering of crime and the quality and price of liquor accessible to the public. But in one respect it would not be an improvement; it would not take the question out of politics, and this for two reasons. We are a more diversified people than the Canadians, and therefore we would have the local-option kind of agitation wherein the Wets would try to extend, and the Drys to restrict, the area covered by the public liquor service. And, more than this, we are not as much as the Canadians a political people. Less than any other people in the world do we

depend upon our government to do things for us. If we are seeking to accomplish some object of public importance, the last place we go is the government. And our government machine is therefore not kept in good trim. It lacks the discipline necessary to carry on, without corruption or scandal, a large-scale retailing enterprise. If we gave the government a monopoly of tooth-paste and set up a chain of public tooth-paste dispensaries, we would put tooth-paste in politics and have a tooth-paste scandal. How then can we expect to take liquor out of politics by putting it in?

There is no guarantee that the alliance of bootlegger and politician would be broken; far greater is the probability that the same personnel in both camps would continue to share the same sources of graft. The bootlegger would become a public servant, and the money now collected by the politicians for protection would then be collected under cover of letting contracts for liquor supply. The superiority of the public dispensary to regu-

lated private enterprise would be questioned by Drys and Wets alike, and the fact that liquor was being retailed by the government would keep the liquor question constantly on the political agenda.

6. *Repeal of Prohibition laws.* Let us stretch our imaginations further and assume that all legislation against liquor is repealed. A legalized liquor industry returns like Rip Van Winkle from the mountain. How changed is the scene! We cannot know with any certainty how this industry would organize itself, except that of one thing we can be sure: it would not reproduce the organization it had before its excommunication. There has been such a shuffling of American social conditions that the old place is no longer open for it. The new position which women have established for themselves, the chain store method of distribution, the higher wage scales and standards of living, the large-scale method of organizing industry in great units, the new conception of the power of advertising and the importance of nursing the public relations of an industry, the dissolution

of the attitude toward liquor once built up by the Women's Christian Temperance Union crusade, would all conspire to make the reproduction of the old situation impossible. The vested interests of the gangsters and bootleggers which are easily capable of protecting themselves against the police and which would rapidly take over a public dispensary system, would be helpless before the onslaught of a liquor industry with responsible leadership and unlimited financial resources. Revolutions such as that which replaced the movie with the talkie are easily accomplished when capital is available, and such a revolution would be expected in liquor selling if it were legalized. We have no way of prophesying whether the standard legalized liquor-selling establishment would look more like a tea room, an Automat, a Child's Restaurant, a night club or a brothel, but we can be pretty sure that it would be just about as hard to reestablish the old saloon in its old social context as to maintain the corner grocery in its vanishing social functions.

We do not know what form a returning liquor industry would take, but we are well justified in assuming that, as long as the Prohibition program continues as a fixed idea in the minds of the groups that have been hereditary Prohibitionists since 1840, the agitation will go on. Though we peer as far as we can into the future of our liquor policies, we see no road that leads us out of the tumult and into a land of peace. Neither enforcement, nor nullification, nor modification, nor repeal, will solve the liquor question so long as Prohibition is taken as the guiding point.

V

Education

In American social thought *legislation* and *education* appear rightly as coequal instruments of social policy, each of which disposes of an army of servants, each of which can be manipulated to serve one or another cause. Great as is our faith in the efficacy of legislation, our belief in the virtue of education is even greater. The word has become a charm word. We expect of education such prodigies of beneficence as men expected of the Goddess Fortuna in the third century A. D., and of the Virgin Mary in the thirteenth. The investment we are making in educational establishments beggars by comparison the most extravagant endowment ever showered upon a cult. It would be strange, indeed, if we did not appeal to

education to end the liquor schism, since we appeal to it for everything else in the register of social improvement. There is a certain sound reason for the faith in education, for if we could get all people to think and behave alike where liquor is concerned, the schism would be ended. And education is indeed the only instrument capable of producing such unanimity.

Yet a fact so obvious that it is usually neglected must be kept in mind: education, like legislation, is a method rather than a solution, a tactic rather than a goal. To cry "education" without specifying the doctrine which is to be taught is as meaningless as to cry for legislation without specifying the character of laws which it is desired to enact.

Is there a system of ideas with which the whole country is willing to have itself indoctrinated? Is there a code of behavior with respect to liquor which has the approval of all? The Drys call for total abstinence, the Wets for temperance. Thus the two systems of ideas which in the plane of

legislation confront each other as "Prohibition" and "modification" are still found confronting each other on the plane of education, with their stock of catch-words complete, and their arguments substantiated with testimony drawn from a score of sciences and pseudo-sciences.

As between "abstinence" and "temperance" there is no unanimously accepted preference. Neither the scientists nor the clerics—the two groups who hold authority in matters of thought as the legislators hold it in matters of law—are in agreement on this issue. The fact that certain churches are predominantly Dry and others predominantly Wet leads one to suspect that in the liquor controversy we have to do with proselyting by one cult for the observance of its dietary taboo. The Baptists and Methodists entertain toward liquor an attitude not unlike that of the Jew toward pork or the Roman Catholic toward the eating of meat on Friday. The fact that the testimony of scientists is cited both for and against the moderate use of liquor leads us to doubt the

finality of the appeal to "Science." For the facts which are pertinent to the dispute do not all fall within the competence of any science, nor are they subject to the control or the discipline of any one branch of learning. These pertinent facts are to be found strung all along from physiology to aesthetics, from sociology to ethics. Between abstinence and temperance there is an issue which no existing tribunal of thought—moral thought or scientific thought—is competent to decide for the American people.

Yet there must be some postulates which are acceptable to all, to Wets and Drys alike. We do not know what they are, but they are worth looking for, for *they are the necessary starting point of any policy in education or legislation which will solve the liquor question.*

There must be some system of views about the use of liquor, some ethical standard, of which the Wets could say, "So much we admit," and the Drys would reply, "It is not enough, but so far as it goes, it is true."

If the point of unanimity could be found, it would be wise to concentrate attention upon the devising of a liquor regime which would be most favorable to the realization of this minimum ideal. The resources of pedagogy and advertising could then be called upon to propagate effectively, without stirring up counter-currents to undo their work, a doctrine corresponding to this ideal.

Thus an examination of the potentialities of education as a device for solving the liquor problem leads to the question of a minimum ethic of drinking. There has been no systematic inquiry to determine whether there is an ethical standard so widely acceptable that only the crank and freak would deny that it is valid at least as far as it goes. Lacking a clear statement of the minimum objective, the arguments of Wets and Drys take on that kind of confusion which comes upon social thinking when means and ends are confounded with each other. Prohibition is sometimes presented as a means whereof the abolition of intemperance is the end, and at other times it

is set forth as an end in itself. The Wets sometimes reproach Prohibition with having caused an increase in the use of liquor, thus implying that they prefer a regime in which a minimum amount of liquor is consumed. The evidence of the confusion is apparent in those phrases which have become part of the small change of conversation: "Prohibition is all right but it doesn't prohibit," "I'm against Prohibition, but I don't want to see the saloon back." There may be in the mind of the American people the materials for a far wider consensus of opinion on the use of liquor than the present formulation of the issue reveals. Let us then attempt to classify, not attitudes toward Prohibition, but attitudes toward liquor.

The old Teutonic tradition brings to us an attitude toward liquor expressed in the words "drinking bout." In accordance with this tradition men compete with each other in capacity, and compete also against the liquor itself as an opponent. The man of small capacity, who quickly loses his head,

or whose stomach is quickly turned by drinking, is regarded as a weakling, and is properly to be despised. The large amount of liquor consumed by a man or a party of men is a proper subject of boasting. Drunkenness is a social duty imposed upon all who join in a drinking bout, but the strong man does not yield too quickly to the liquor. He proves his strength by the quantity and strength of the liquor he can drink before he goes under. So the Gods drank in the old Norse mythology. And have we not those among us who will boast of a row of gin bottles as Thor boasted of the size of his drinking horn?

There is a less boisterous and a merrier tradition which suggests the sunshine of Italy rather than the mist of England, or a shady terrace rather than a smoke-filled hall. In this tradition wine is not the opponent to be vanquished but a means to be used in the art of social intercourse. Drinking has as its object the achievement of a state of mind which will be pleasant and profitable to those who share it. The virtue of the occa-

sion is to be sought in the excellence of the wine and the brightness of the conversation which flows from it. The ceremonial of drinking is developed toward refined forms which retain no trace of the competition of drinkers against each other or of each drinker against the wine. The art of judging wines is highly developed; it becomes a science, with a Greek name—*oenology*. The art of mixing drinks corresponds, for the users of distilled liquors, to the art of judging wines. Everywhere the aesthetic side of drinking is brought to the fore, and the offering and accepting of liquor is fixed as a part of the ritual of hospitality.

More humble but just as deeply rooted as the ceremonial and artistic attitude toward liquors is that which looks upon them as the normal parts of a standard diet. "*Pas de pinard, pas de poilu*" —no wine, no soldiers—was a slogan of the French army in the World War. This attitude enters the arena of the present liquor controversy in the phrase "wine with meals." The habit of using liquor as a part of the regular family meal goes

along with certain kinds of cooking and certain standard fare. The true French or Italian cuisine breaks down completely when the food has to be served without wine. Nor is this true only of the more elaborate and delicate foods. To people who have certain common food habits, bread and cheese with wine are a dinner, while bread and cheese with water are no better than prisoners' fare. To deprive these people of liquor does more than merely to take away from them a commodity they enjoy; it disorganizes their whole diet.

Another attitude toward liquor is common to those who have never made liquor a part of their routine of life, nor trained themselves to enjoy it. They have little to say of the use of liquor, but are definitely committed to the disapproval of the abuse thereof. With them, the use of liquor begins to give rise to a moral issue. They would say that it is an issue between temperance and intemperance. Like the men of the drinking bout, they look upon liquor as an opponent, but their

attitude toward this opponent is more defensive, rather than aggressive. The champion of the drinking bout drinks his beer by the tub-full and boasts of his capacity; the champion of temperance drinks a small glass and boasts of his restraint.

There is also a neutral attitude held by some people who are total abstainers. For themselves, they say, they do not enjoy liquor, or their doctors forbid them to drink it, or they have never had an opportunity to acquire a taste for it. They do not regard the use of liquor, especially in moderation, as a wrongful act, nor do they look upon the liquor question as a moral issue. These persons are the tolerant abstainers from drink.

Finally, there is the attitude of those to whom liquor is a cult taboo. With religious earnestness they deplore the evil that is latent in the smallest of glasses of the mildest of intoxicants. So intense is their hatred of drink that they are angered by the thought that anyone should use

any liquor whatsoever. They regard liquor as an enemy, an opponent with whom they must contend; but the only victory over liquor, to their minds, is total abstinence. "Have courage, my boy, to say *No*," runs their song. In their view the strong man is not the man who drinks most liquor or the one who controls himself in the drinking of liquor, but rather the man who refuses to drink at all.

We have distinguished six degrees of opinion which separate the ultra-Wet from the ultra-Dry. They are the attitudes of those who use liquor for (1) a drinking bout, (2) aesthetic enjoyment and ceremonial, (3) habitual diet, and (4) exercise in moral restraint, as well as those who (5) abstain with tolerance, and (6) abstain with moral fervor.

Of these six attitudes, four involve the use of liquor, while two call for abstention. Two of them accept liquor as a part of normal life, without giving it any special position as an antagonist against which man tries his strength; three of

them regard liquor as a competitor against which man strives in combat. Drunkenness in the drinking bout is a sign of courage; in connection with the ceremonial or aesthetic use of liquor it is a breach of good form or good art; in the eyes of the man to whom liquor is simply a part of the regular meal, it is a reprehensible wastefulness; to the temperance advocate it is a sign of weakness, and to the moralistic total abstainer it is the deadliest of the deadly sins.

Certainly this list of six attitudes does not exhaust the number of possible attitudes toward liquor, nor even the number of attitudes actually held among the American people. But the list is long enough to indicate the difficulty that would confront anyone who would seek to draw up an educational program which would bring the country to unanimity on the liquor question. Which of these attitudes should be selected as the basis of teaching if education is to solve the liquor question? The antithesis of temperance *versus* abstinence remains.

However, there is no reason for giving up the search for an ethic of drinking which would obtain maximum approval. (Note that we speak here of *an attitude toward liquor*, not a political policy or regime.) We can only make guesses in trying to define this standard, but even guesses on this question are worth making. As a guess, which is subject to correction as soon as research shall have uncovered more facts in this connection, it is suggested that these four following propositions define opinions which most of the drinkers would agree to, and which most of the abstainers admit to be true, even though insufficient:

1. That a temperate use of liquor is better than an intemperate use.
2. That education and training should discourage the intemperate use of liquor.
3. That a disproportionate part of a man's income should not be spent for liquor.
4. That when liquor is drunk under conditions or in quantities that bring injury to some person other than the drinker, the injured person has just cause of complaint.

Probably a few of the roisterers of the drinking bout would deny these propositions, saying that they believed in drunkenness, and a few of the most fanatical of the total abstainers would denounce them because they seem to offer approval of moderate drinking, even though the approval is expressed only in relative terms. But there is no doubt that these general propositions concerning liquor come far nearer to having the unanimous approval of the country than does any specific measure of liquor legislation or policy before the American people.

If the country could in some way identify and define that attitude toward liquor upon which there is the nearest thing to unanimity, it would be in the possession of the key to the solution of the liquor problem. And if a serious attempt were then made, in the light of contemporary knowledge of educational and advertising technique, and of law and administration, to devise a regime which would best realize the ideal implied in this attitude, there would be a good chance of finding

a remedy which would quiet the agitation of the liquor question. The starting point in devising a liquor regime should be something upon which the country is agreed, and not a pair of opposed prejudices with a hundred years of controversy behind them, or a program which the exigencies of political warfare have transformed from a mere means-to-an-end into an end-in-itself.

VI

How to Make Men Good by Law

Legislators from Prophet Moses to Senator Jones have usually intended that their legislation should contribute toward the realization of the unattainable ideal of making men good. To aver that the law cannot contribute toward making men good is to assume the position known in political theory as "philosophical anarchism." Whoever is not an anarchist will agree that laws can improve men, at least so far as external conduct is concerned. It does not follow that any item of legislation, by the mere fact that it is enacted, will necessarily result in making men better. The law itself must be good, and excellence in a law requires a certain relation of harmony with the opinion of the people, the machinery of govern-

ment, and the material facts to which the law is to be applied.

Harmony of Law and Opinion.

It was once the dream of the romantic democrats of the French Revolution that they could so contrive a government that under it no legislation could come into existence unless it were in harmony with the opinion of the people. Law, under a perfect system of government, was to be a manifestation of the "general will," which was a very different thing from the "will of all" (*volunté génèrale* and *volunté de tous*). Rousseau, familiar with an environment wherein the politically articulate public was small, addicted to theoretical discussions, and full of people who were ready to entertain one opinion in a *salon* conversation, while intriguing for a contrary policy at court, saw very clearly that a man's opinion of what the country required might not coincide with his opinion of what his personal interests demanded. He had seen this small *intelligentsia* swept to

unanimity by vogues in thinking and talking; he dreamed of a perfect state in which legislation would result from the kind of opinion-forming that went on in the *salons*, where people discussed the welfare of the state in general terms. But the legislative process under democratic government was a disappointment; it did not proceed by the method of the symposium like conversation in a drawing room; it proceeded rather by the method of barter and bargain like the intriguing at an eighteenth century court. The legislation which it ground out was not a formulation of the *volunté génèrale*, but of the *volunté de tous*.

We have learned by practical experience that legislation is seldom an expression of the will of the whole people, but is usually the product of the agitation of some interest-group. Statutes do not create themselves automatically out of a consensus among citizens; they are manoeuvred and parleyed for and pushed through the legislative process by the pressure of some interest that demands this particular legislation. The legisla-

tive lobby is not an exceptional and cancerous growth in the political system; it is as much a part of the real government of the country as party system and patronage.

The great bulk of legislation, like the great bulk of judicial business, has to do with other things than the expansion of criminal law. The laws which change private rights far outnumber those which strike out, as instruments of social policy, to effect an innovation in the behavior of citizens by altering the criminal code. The laws which change private rights are, in theory at least, intended to make men better. The employer's liability law makes employers more careful of the safety of their workmen; the laws defining the liabilities of common carriers cause the railroad officials to be more watchful of the interests of shippers and passengers than they would otherwise be. Even the protective tariff, in theory, is intended to make it possible for owners of industrial plants to continue in the socially desirable practice of giving employment to American labor (a benef-

icence from which foreign competition would otherwise compel them to abstain) and to restrain the ill-intentioned foreigner who would wish to supply his commodities to the American market at a low price.

The familiar pedantic theory which represents the legislative act as a restraint imposed by the citizen upon himself is very misleading. Men do not go about making laws for themselves; they make laws for each other. The interest-groups which press legislation upon a law-making body are not trying to compel themselves to do otherwise than they would wish to do. They do not expect to have their own habits and desires interfered with as the result of an enactment. They want the other people to be good. This is not only true of laws relating to property rights, which enforce themselves in the civil courts; it is also true of criminal legislation which depends for its enforcement upon the activities of police and prosecutors. The Chamber of Commerce secretary who pushes forward the cause of an anti-

syndicalist law is not legislating for himself but for others. The law will never apply to him because he will never be tempted to join the I. W. W. Similarly, the total abstainers who vote for Prohibition are not depriving themselves of anything; they are enacting a law which will not modify their own conduct at all. So definitely is this denial of self-government accepted as a part of our political system that when a man is observed to vote Dry and drink Wet he is not given any credit for trying to reform himself by legislation; he is not recognized as the only type of citizen who, with reference to liquor control, is ruling himself rather than someone else. If his vote results in an effective Dry regime, under which he can procure no liquor, he will have sacrificed something, whereas the total abstainer who votes with him will have sacrificed nothing. But public opinion gives him no credit for the sacrifice; he is disowned by all parties.

The law by which the Drys try to improve the moral character of the Wets is not exceptional

in purpose. Like the law by which unionized labor seeks to raise the standard of behavior of the mill owners, or by which manufacturers endeavor to reform the business practices of importers, or farmers attempt to elevate the sense of social responsibility of grain dealers, it is an attempt to make somebody else be good. If the achievement of the liquor laws fell conspicuously below their intention, the fault was not in a departure from the usual purpose of law in trying to make men good, but rather that the method chosen to accomplish this normal legal object was not adapted to the end. It was adapted neither to the state of opinion, nor to the machinery of government, nor to the material facts to which it referred.

The amount of support which a law requires of public opinion is not a constant quantity. Some unpopular laws are very effective; some laws fail to have their intended effect despite a great popularity. At least two factors control the necessary ratio between public support and effectiveness. If the incidence of the law is broad, that is to say,

if it touches many people directly, the popular backing must be strong; if the enforcement of the law depends upon the actions of public officials, and is not accomplished privately in lawsuits brought by persons whose interests the law protects, a still larger claim is made upon public opinion. The Prohibition law on both of these counts required a very heavy preponderance of opinion in its favor. No mere majority would have sufficed. It probably had a majority in 1920, even though the *Literary Digest* poll allows it less than that today, but had it ever an adequate majority? Kansas, dryest of states, gave only a fifty-seven per cent majority for enforcement in the *Digest* poll. Is this a sufficient preponderance? That such majorities are inadequate is apparent when the effectiveness of the Prohibition law is compared with the effectiveness of the law controlling the use of narcotics. The incidence of the narcotics law is small; there are comparatively few drug addicts; it could be enforced with less public opinion behind it than effective Prohi-

bition would require. But actually it disposes of a much stronger force of opinion than Prohibition has ever mustered.

The machinery of enforcement with respect to Prohibition makes even further demands upon public opinion. For this is a law which cannot be made effective by private enterprise, because a violation of the law ordinarily gives no injury to a third party, and seldom gives to anyone a right which it would be worthwhile to prosecute in court. It is not at all impossible that an anti-liquor law could be devised which would have a smaller incidence, for one might legislate against the use of liquor by persons who abuse it. It is equally possible that an anti-liquor law could be so drawn that it could count upon the aid of persons injured by liquor consumption to further its enforcement. Legislation, so contrived, could be made effective on a much narrower basis of public approval than the present legislation would require. The present legislation is simply out of tune with the state of public opinion.

Liquor Legislation and Government Machinery.

That laws are more effective, regardless of public support, when they depend upon private enforcement, is in part a consequence of the peculiar nature of Anglo-Saxon administrative and judicial institutions. As Professor Esmein points out in his analysis of judicial procedure in criminal cases, there are two main approaches to the problem of controlling the criminal—the inquisitorial and the accusatory. Accusatory procedure assumes that the community is merely a referee in a dispute between two persons, one of whom declares that he has been wronged. Inquisitorial procedure assumes that the state, not leaving detection and prosecution to private initiative, accepts this double duty as its own. Of these, the Anglo-Saxon represents the accusatory type of procedure, and the European Continental the inquisitory type.

Accusatory procedure comes from early Teutonic law; inquisitorial procedure comes from Late

Roman and Church law. In accusatory procedure the injured party gathers the evidence with which he publicly confronts the accused before a jury of his peers. In inquisitory procedure public officials initiate the action, gather the evidence, and try the accused secretly before men who are not his peers, but specialists appointed by the ruler to aid in dispensing justice. In its barbarous form accusatory procedure used the ordeal, and inquisitory procedure used torture. Anglo-Saxon judicial institutions have borrowed from inquisitorial procedure the public prosecutor or district attorney, who is supposed to be the champion of the injured commonwealth engaged in a battle with an accused culprit before the judge as referee. Continental procedure in modern times has borrowed the Anglo-Saxon jury, which shares with the Continental judge some of the responsibility of coming to a decision on matters of fact. The measures proposed by our own Law Enforcement Commission to break away from jury trial in handling liquor cases are an acknowledg-

ment of the lack of adaptation to our judicial institutions which characterizes the present liquor situation.

The difference between the two types of procedure is paralleled in a difference between the elaborate police and detective organization maintained by European governments, and the primitive and uncoordinated police organizations of America. Just as some religions lend themselves better than others to the effective use of persuasion in influencing drinking habits, so some police systems are better adapted than others to the enforcement of criminal legislation of the type represented by the Prohibition law. This was illustrated in the measures taken in Europe and America respectively, to meet the problem of food control during the world war. The Europeans had their thorough system of police registration to serve as a starting point in food administration. They issued food tickets for every controlled product, and ran the whole enterprise as a branch of their normal supervisory police activity. The Ameri-

can food control system could not depend upon the use of police registers, but had to be built up with volunteer organizations warmly supported by public opinion. Americans in their own country enjoy a freedom of movement which astonishes a European. There is no running down to the police station to register every change of address, no taking out of cards and permits in order to secure oneself the right to exist. We have the Prohibition law, and they have the type of police system best equipped to enforce it.

The governmental machinery best suited for Prohibition enforcement would possess not only an elaborate supervisory police force, but also a well integrated union of Church and State. Successful dietary taboos usually depend upon a religious sanction. The Catholic Church of the Counter Reformation, with its system of auricular confession on the one hand, and its courts of the Inquisition on the other, was in a position to exercise an effective morals police. It enjoyed the fullest co-operation of the State. With its powers

of persuasion and punishment it could control not only overt behavior, but even inward attitudes. The Calvinist Puritans were handicapped in the supervision of conduct because they had given up one of the most effective weapons of morals police ever invented—auricular confession. When the Methodist Board of Temperance and Morals asks the aid of the "secular arm," it repeats the tactics of the Counter-Reformation and the Inquisition, but without the ability to obtain their results. They cannot secure universal membership in their Church, or even effective control of the conduct of Church members through Church agencies. The Methodists would be willing to tighten their alliance with the State, but they have nothing to offer the State. They would be willing to increase the severity of the legal penalties to anything short of burning at the stake. But they lack the highly integrated organization which would make effective their co-operation in an inquisitorial institution.

To obtain optimum conditions for Prohibition

enforcement, great and profound changes in government would have to be made. Our judicial procedure is accusatory; it should be inquisitorial. Our government is federal; it should be centralized. Our police system is protective and local; it should be supervisory and general. Our State is separated from the Church; it should be united therewith, having membership in both incumbent upon all. We have neither the courts, nor the police, nor the jails, nor the habits in matters of government, which would make it possible to carry out easily the intention of the law to transform bad Wets into good Drys. It is for this reason that the liquor laws place so great a strain upon our government.

The Liquor Laws and Natural Facts.

Not only the state of public opinion and the character of the government, but even the material facts to which the law relates mark out the present liquor legislation as ill adapted to the purpose of making men good. The law is con-

fused and uncertain because of the elusive character of the facts to which it relates.

The Eighteenth Amendment prohibits the manufacture, transport, and sale of intoxicating beverages. Every term of this formula generates ambiguity and confusion because of a lack of harmony with the facts. The very concept of an "intoxicating beverage" is a legal fiction, while the prohibitions of transport and sale for beverage purposes are roundabout ways of controlling drinking itself, which by its nature tends to elude police supervision.

What is an intoxicating beverage? Is a beverage to be called "intoxicating" when it does not actually intoxicate? The courts answer this question by taking judicial notice that certain liquids are "intoxicating beverages" and refuse to permit the introduction of evidence to show that in the particular case they did not actually intoxicate. But will liquor ever intoxicate if used in moderation? The court ruled in *Wadsworth vs. Dunnan*, 98 Alabama 610 that intoxication could re-

sult only from the unreasonable use of liquor.

> "Intoxication by means even of those liquors which the law itself recognizes as *per se* intoxicating in general acceptance, is produced by their unreasonable, inordinate, immoderate or excessive use, and to say that no liquor is intoxicating unless its moderate and reasonable use will produce inebriety is to declare that no liquor whatsoever is intoxicating."

This ruling is sound. The very concept of "intoxicating beverage" implies a presumption of unreasonable use. The fictitiousness of this legal presumption is so patent that it stultifies the attempt to interpret anti-liquor laws consistently. An entirely different concept of intoxication—"intoxication-in-fact"—which assumes a presumption of reasonable and moderate use of liquor, is expounded by the Prohibition Administration in interpreting Section 29 of the Volstead Act, which permits the home manufacture of "non-intoxicating" cider and fruit juices.

The problem of discriminating between potential and actual intoxication arose in the inter-

pretation of Moslem law, just as it arises under the Eighteenth Amendment. The word of Allah, as spoken to the Prophet in *Surah V, 92* of the *Koran* is as follows:

> "Oh, true believers, surely wine and gambling are an abomination of Satan, therefore avoid them, that you may prosper . . . In those who believe and do good works it is no sin that they have tasted wine or gaming before they were forbidden."

The material facts which derive from the nature of liquor were just as obstinate to the Moslems as to us. Was it intended in these verses to prohibit all wine, no matter whether it was used moderately or excessively? The ninth century commentators, Jalalu'd-din al Mahalli and Jalalu'd-din as Suyuti, interpreted the passage to mean: "Only that wine is forbidden which intoxicates the brain and affects the steadiness of the body." So also the Prohibition administration tries to rule that in certain cases (where home manufacture is involved) it will use the factual definition of intoxication, but in cases involving manufacture and sale it

will use the legal-fiction definition. But the orthodox Moslem doctrine did not accept the commentator's modification, and it does not seem that the privileged position of home-manufactured liquors is at all secure in the present Prohibition system.

If the Eighteenth Amendment means to use the words "intoxicating liquors" in the legal-fiction sense, then it is an arbitrary act of nullification for the Prohibition commissioner to permit legally intoxicating liquors to be manufactured in the home. When Commissioner Doran declared, as he repeatedly declared, that he would not try to interfere with homebrewing (which is definitely prohibited by law) or winemaking (which is ambiguously prohibited), he was doing exactly the thing that President Hoover declares will cause "our whole system of government" to "crumble"; he was an official electing what laws he will enforce. But if the Eighteenth Amendment means only actual and not fictional intoxication, then the concept of intoxication-in-fact should be applied to all liquors, whether manufactured in the place

of consumption, or manufactured for sale. So interpreted, the Eighteenth Amendment creates no constitutional right to interfere with any beverages which are reasonably used.

But disregarding the distinction between actual and fictional intoxication, some fluids are being prohibited by statute although no possible use, moderate or immoderate, could render them intoxicating. A beverage which is just over the one-half of one per cent limit in its alcoholic content is no more capable of causing drunkenness than is fresh milk. The definition was taken from the revenue laws, where the intent was to prevent tax-free manufacture of weak brews and carried over into the criminal law, where the intent is to describe a natural process of which the law takes cognisance. An Act of Congress can no more render a one per cent drink intoxicating than it can cause Washington weather to be cool in July. These are natural facts which impress themselves upon the liquor situation, regardless of the legal or social context of the policy of regulation.

The Prohibition administration thus exceeds the limits set by the Eighteenth Amendment on one hand, and nullifies the Amendment itself on the other. This disharmony is further accentuated when the activities of other branches of the government are taken into account. The Supreme Court, in a sweeping decision attacking the raw materials and equipment used in liquor manufacture, empowers the Prohibition administration to campaign against the dealers in bottles, corks, barrels and home-brewing supplies. This is simply carrying one step further the principle already invoked in the attempt to prohibit the serving of ginger ale and ice water to guests at hotels. There are prohibited not only the things which may intoxicate, but the things which may be used to produce the things which may intoxicate. The question of how the liquor is actually used, the most important question from the standpoint of common sense, falls beyond the cognisance of the law.

But while the Supreme Court is implementing

the drive on the makers of liquor, the Department of Agriculture continues to instruct American citizens how to use the forbidden barrels which the Commissioner wants to seize, in making the forbidden wine which the Commissioner chooses to permit. And the Farm Board offers government money to help in financing the juice-grape farmers of California, who are marketing their entire product to wine-makers and selling the grapes and grape-juice publicly in carload lots all over the country.

This is indeed a curious situation. The Farm Board offered twenty million dollars to help market the crop provided the grape growers would sign up 85% of their acreage under contracts providing for a tax on the crop, to be used for buying up the surplus tonnage and converting it into "by-products." Public-spirited citizens throughout the grape district cooperated in the drive to sign up the acreage. The last phase of the campaign was characterized by night riding and terrorism to coerce obstinate growers. One

man was killed and two wounded. But the drive succeeded. The marketing of the crop is now going forward under government auspices; the wine grape industry has been protected from ruin; the supply of raw material for the bootleg wine industry has been stabilized; the manufacture of grape jams (sold for winemaking) is adequately financed. And at the other end of the line officials of another branch of the government are trying to confiscate the barrels, bottles and corks! The government advances money to the man whose product goes into the barrels which the Supreme Court has empowered the enforcement officials to seize.

These observations are not offered in a spirit of captious criticism; they are intended simply to show the intrinsic difficulty in applying legislation of the Prohibition type, which takes no account of the distinction between noxious and innocent uses, to facts as complex as those involved in the liquor problem.

It is not only the difference between natural fact

and legal theory as to the process of intoxication that creates anomalies in the administration of the law; there is also a disharmony between the legal and factual character of the manufacturing process. In common usage we think of manufacturing as a process in which the ingenuity of man is occupied on some more or less complicated manipulation to create some new product. Such treatment is not required to cause fruit juices to ferment, but only to keep them from fermenting. The Department of Agriculture is aware of this aspect of the manufacturing problem. In the bulletin in which it gives disguised instruction in wine making it advises: "fermentation is prevented by keeping the temperature of the liquid below 50 degrees F., or by adding potassium metabisulphite to the juice at the rate of 2 to 5 ounces per gallon." However, it admits that in "small scale homework it is neither advisable nor convenient to control fermentation by the cold or chemical treatment." The citizen can draw his own conclusions.

The wife of the ex-Prohibition Commissioner has been working out recipes for fresh-fruit-juice drinks, which she recommends as substitutes for liquor. A jug full of one of Mrs. Doran's fruit punches could violate the law overnight while its owner sleeps. If Clarence True Wilson served some of this recommended beverage to Bishop Cannon and Mr. McBride of the Anti-Saloon League, and then forgot to pour the surplus supply into the drain, the ubiquitous micro-organisms would soon be at work creating an alcoholic content of more than one-half of one per cent. The Prohibition administration takes cognisance of this fact by establishing the executive policy of refusing to enforce the anti-manufacturing law against those who make liquor in the home. The Volstead Act in Articles 29 and 33 provides that no penalties shall attach to the manufacture without permit of "non-intoxicating cider and fruit juices exclusively for use in the home." The instructions issued by Commissioner Doran on August 6, 1929, order his agents

not to interfere "with such manufacture and use in the home, unless upon satisfactory evidence of the unlawful sale of such non-intoxicating cider or fruit juices. . . ." But if the cider or fruit juices are really "non-intoxicating," it is not under any circumstances unlawful to sell them. Clearly the law is creating a fictitious non-intoxicating home-made wine which is just as unreal a substance as the "intoxicating" one-half of one per cent near-beer (which is unlawful, even when made at home). The anomaly in a law which does not take into account the fact that home-fermented fruit juices may become intoxicating was glossed over by Commissioner Doran in the policy which left it to the local authorities to formulate their own policies of control relative to such home manufacturing. Thus the double meaning given to the word "intoxicating," which is interpreted sometimes to refer to an alcoholic content, and sometimes to a result of intemperate use, introduces into the law an elusive metaphysical uncertainty which was played upon by Representative Fort in his

defense of home manufacture, and which is solved in practice by administrative nullification.

In the shifty interpretation of the Prohibition law the Wets and Drys find a common meeting ground. Fort, who ran on the Dry ticket in New Jersey meets La Guardia, a leader of the Wets in Congress. In his famous speech of February 1, 1930, Fort expressed his doubt whether the language of the law could be stretched to legalize home-made beer, but went on to advise:

"To those who want beer and light wines I suggest that they forget the wish to buy, and be content with what they can make."

La Guardia sends out to his constituents, enclosed with the above-quoted bulletin of the Department of Agriculture on wine making, an instruction leaflet of legal advice:

"The beverage may be called wine or beer, but must not be labelled as such. . . . The question of the intoxicating character of the beverage is not determined by any fixed or arbitrary content. . . . the average home-made wine may be considered as

non-intoxicating within meaning of the law. . . . It cannot be given to strangers; it cannot be sold to friends. Even though the beverage is non-intoxicating, it loses its legal character if sold." Thus fiction is piled upon fiction. A liquid does not become intoxicating by reason of its use, nor its alcoholic content, but by reason of its transportation outside the home or its sale; however excellent the wine may be, the law will tolerate it only under the fictitious name of "Non-intoxicating fruit juice"; beer must be presumed to be a fruit juice, not a malt liquor. How Alice in Wonderland would have enjoyed it!

The actual purpose of the law is not mentioned in the Constitutional Amendment or in the National Prohibition Act, except in that clause which provides that the provisions of the Act shall be interpreted liberally because the intention of the Act is to put an end to the drinking of liquor. There is no prohibition of drinking, either in the Constitution or in the Volstead Act, despite the fact that it is only in the drinking that a beverage

becomes intoxicating. The Supreme Court has ruled that a liquor buyer cannot be convicted for failure to register his purchase, but the question is still open whether he can be convicted for conspiracy to violate the law. If the legal status of liquor purchase is doubtful, the status of liquor possession is certain. It is unlawful to possess liquor illegally obtained. But the one act against which the whole machinery of legislation is directed, namely, the drinking of liquor, especially in immoderate quantity, remains the privileged act which is still lawful no matter how many illegalities surround it. There are good reasons for this kind of indirection in the approach made by the liquor law toward its object. But the fact that such indirection is necessary should serve as a warning that the material with which liquor laws deal is not perfectly analogous to the material dealt with by other criminal laws. Legislation which must seek to accomplish its object by a combination of indirection and fiction is at a practical disadvantage.

If the legislators have not attempted to make drinking illegal, and the administrators of the law have given up the attempt to prevent home-brewing, in order to concentrate their attention upon commercial manufacture and sale, they are still unable to cope with the difficulties which come to them by virtue of the circumstances under which the law is violated. For every illicit sale of drink is a secret conspiracy between the parties engaged therein. The crimes of robbery, rape, murder, forgery—all the crimes that are usually admitted as felonies—are committed by a criminal against a victim. But when a bootlegger sells to a purchaser there is no victim. The crime is completed, and each one has done no more than to receive what he desired. On the other hand, police regulations, such as traffic rules, apply to offenders who injure no one in particular, but in these cases the purposes of the law are adequately met when the manifest and open violations are repressed. The fewer the witnesses to a traffic rule violation, the less is the significance of the violation itself.

The speeder in crowded traffic is guilty of much more reprehensible conduct than the unseen speeder on a lonely road, and he is more easily apprehended and punished for his violation.

If the government were content to repress only the liquor transactions in which one party was a victim of the other (as in methyl alcohol poisoning cases), or where the conduct took place in public, or where the result of the use of liquor was public drunkenness, its policy of making men good by law would have better chances of success. But it does not have sufficient machinery to make the ferreting out of secret liquor offenses successful. The Manchu Emperors of China were able to give effective enforcement throughout the Empire to their edict regulating the style of hairdressing (the long queue) for their Chinese subjects because compliance or violation was openly and automatically manifested. But against opium smoking the Imperial Government was helpless, not only because of the resistance of the British opium interests, but also because

of the lack of an adequate inquisitorial staff.

The standards of goodness which the liquor laws demand are, of course, like any legally established standards of behavior, set by the makers of the law for the governance of those who oppose the law. The law is sponsored by total abstainers for the benefit of topers. It imposes no restrictions which fall upon the sponsors; the sacrifices are made by the moderate drinkers, that is to say, by the only people who really know the uses of liquor. It confers no rewards which appear to its beneficiaries as blessings; the blessings are perceived to be such by the sponsors of the law, the only people whose conduct is unaffected thereby. Thus A compels B to sacrifice himself for the sake of C. Such a three-cornered tension of interests and desires is sufficiently precarious to jeopardize the success of any law. It leaves all interests ill-defined. In the maze of inconsistencies and contradictions in the regime, the essential distinctions are not made. The distinction between public and private conduct, between conduct harmful to a

neighbor and conduct which does not affect a neighbor, and between using and abusing liquor is nowhere clearly drawn.

A simpler regime, imposing a clearer standard of good behavior, and better adapted to the state of public opinion, the character of the government, and the natural facts to which it applies would stand a much better chance of making men good by law.

VII

What Is Meant by Minding One's Own Business

It is related that when Adam was leaving the Garden of Eden he was heard to mumble to himself, "It is nobody's business what I eat or drink." Whether his complaint against the jealous proprietor of Eden was a just one must be left for theologians to discuss; certainly his sentiment finds an echo on many lips today. Whatever system of liquor control we may adopt, we can rightly require of it that it make clear to the man whose freedom it restricts the exact nature of the interests for the sake of which his wishes are sacrificed. And a regime which would distinguish the qualified drinkers from the unqualified, the legitimate uses of liquor from the illegitimate, must be based upon clear principles of policy determining

when the public is and when it is not concerned with what a man eats or drinks. How are a man's own affairs to be identified as such? What is meant by "minding one's own business?" When and where and why does an action become illegitimate meddling?

When de Tocqueville made the keen observation that an American, "condemned to confine his activities to his own affairs would be robbed of one-half of his existence," the doctrine prevailed in the French world of thought that there was an absolute distinction imposed by a Law of Nature, forever setting apart those things which are the concern of the individual from those which may legitimately constitute a preoccupation for his neighbors. Tocqueville would hardly have believed what every student of society accepts today as fundamental: that society itself decides what affairs are one's own business. There are some societies which, in fear of pestilence, concern themselves with a man's piety but not with his sewage; other societies, driven by the same fear, supervise

the garbage disposal of every household, but pay no attention to its manner of worship. In all fields of interest and activity—sex, food, work, sleep, art, entertainment—there are zones wherein society does not accurately define the extent of the community's interest or the individual's freedom. No absolute and eternal standard distinguishes private from public affairs, nor separates the business of one individual from that of another. And even the standards of social intervention set by a community are often vague and full of inconsistencies.

A society lives by doing incompletely two contradictory things: imposing a common standard upon all, and requiring a special contribution from each of its members. The ideal of law and the ideal of specialization or division of labor are respectively realized by making it more varied. From this situation two ethical principles emerge. With respect to the ideal of uniformity it is good that every individual should conform to the laws, customs and standards; with respect to the ideal of

Society more uniform and by making

division of labor it is good that all people should "mind their own business," and refrain from interfering in the affairs of others. The more definitely fields of responsibility are marked out, the more completely is labor divided. In every society, from Plato's Republic to the United States of America, there is some point of equilibrium between the claims of these two principles.

The principle of division of labor applies primarily to the production of material things; the principle of uniformity is primarily effective on the mental level. A man's food is his own and does him good only to the extent that he appropriates it to himself; his talk, on the contrary, is shared with his neighbor and is of value to him only to the degree that it is shared. Property is the primal pattern of the principle of seclusion, as language is the primal expression of the principle of conformity. The seclusion of the individual, his specialization in his own field, his separateness from the rest, is greatest in property matters and least in matters of gossip and talk.

Property rights could perhaps be defined as the amount of exclusiveness which a society will permit an individual with respect to material things. The principle of uniformity, manifesting itself in gossip, opinion, moral precept or law, tends always to override the exclusiveness of the individual. When in describing some human relationship we wish to emphasize the exclusiveness of the man standing against the crowd, we tend to use the property concept as a metaphor applying to his situation. We say that the man was "minding his own business," and the other was "interfering with someone's affairs."

But the question of minding one's own business does not always arise on the same level. Meddling can take the form of discussion, exhortation, of litigation or prosecution. The lowest level of interference is that of gossip and curiosity; above that level there is the kind of persuasive intervention of which the typical example is the evangelical enterprise of spreading a religion. Still more definite is the kind of intervention in which

one man interferes with another in order to protect what he regards as his own rights. The typical example of interfering with another's business upon this level is the lawsuit in defense of a property right. Every creditor who sues a debtor is interfering with the debtor's business, but public opinion does not reproach him for so doing. The highest level of intervention is that which is undertaken by the police officers of the state in the enforcement of criminal law. We can imagine a man whose drinking in one community would be an object of gossip; in another it would give rise to attempts to persuade him to alter his habits; in another it would cause his wife to sue him for divorce and separate maintenance; and finally in some communities he would be arrested for unlawful possession of liquor. At which point would it be said that there begins an unjustified interference with his freedom to eat and drink as he pleases?

Under what circumstances will he recognize the neighborhood's right to talk about him, but not to exhort him, to exhort him but not to sue

him, to sue him but not to have him arrested?

On the level of gossip there are very few things in which Americans protect themselves from intervention. There are some things, such as sex in marriage, which are, in the opinions of many, properly to be exempted from interference even on the level of curiosity. They are not to be talked about. In some circles it is considered very rude to ask how much money one makes, or how much something has cost; elsewhere these are accepted topics of conversation. As to eating and drinking, most people do not restrain their curiosity. They discuss their neighbor's doings. They do not think it indiscreet to ask each other what there was to drink at So and So's party; they criticize bad cooking and bad liquor, and no one resents their idle comment.

On the level of exhortation the American is much more sensitive. Both the Wets and the Drys regard the evangelism of the other party as a grievance to themselves. The resentment of the drinker urged by some preacher to sign the pledge

was a familiar source of comedy until the temperance campaign was dropped in 1918. The temperance campaigners themselves always condemned the illicit persuasiveness of saloon-keepers and boon companions. Under the regime of the Volstead Act there continued unabated a kind of inverted prohibitionism enforced in some places by group opinions. There are circles in which it is required that a host shall provide liquor for his guests. The penalty for disobedience is qualified social ostracism. The late comer at a party is expected to "catch up" with the rest. In many groups the broad tolerance which still recognizes the right of a guest to refrain from drinking is rare indeed. Where the right to persuade in favor of liquor is so widely acknowledged, it is illogical to deny the right to exhort against liquor. Let the drinker have strength of mind to resist signing the pledge; let the hero of the temperance song have courage to say No.

So long as the people who concern themselves with the drinking habits of others remain on the

level of curiosity or evangelism, their activities may give rise to resentment, but create no serious social problem.

Though the legitimacy of the gossip and gospel types of interference in other people's affairs be recognized quite generally throughout the country, it does not follow that activities on these levels are everywhere equally effective. The small town is everywhere the unit in which curiosity and gossip play a large part in life; the great city offers its people an anonymity which shields them from criticism. The nomadic city-dweller, who migrates every year from one apartment house to another exactly like it, does not know his neighbors well enough to criticize them effectively, even if he were inclined to do so. Apartment-house gazing in cities—the indoor sport of watching the windows of nearby apartments—takes its special character from the anonymity of city life. In a village there is also a habit of watching one's neighbor from behind half-drawn blinds, but with a totally different object, because in village life one views

every act of a neighbor as part of a biography; in apartment-house life the incidents one notices in a neighbor's life are mere isolated pictures.

Because of the anonymity of city relationships, the evangelical type of intervention in the lives of others is also particularly ineffective in cities. To live in a great city is in fact to live a double life. Under normal circumstances the working environment and the living quarters are two different worlds. It is almost impossible to hold anyone steadily under the influence of exhortation. Those who seek to exert their influence on their neighbors under city conditions therefore resort to the mechanical devices of advertising campaigns and newspaper publicity enterprises, in which an impersonal surface speaks to an anonymous crowd. Under these conditions persuasion tends to affect only those who are already persuaded; there is no concentration of homiletic energy upon those who stand most in need of it. And this is exactly the reverse of the situation obtaining in the village.

Persuasion in influencing drinking habits, therefore, is effective to a degree inversely proportionate to the density and concentration of population. It also diminishes in efficiency as one passes from a culture area which we can call Middle Western (although it is spread over many other areas) to a culture area which can be designated as Eastern (although not all of the eastern section of the country participates in it.) The difference between these two cultures is so marked that the good citizen of Iowa or Kansas who goes to an eastern community will often feel as if he were in a foreign land. The cool urbanity of the Easterner irritates him. Conversely, some sales managers say that they cannot successfully entrust middle western territory to eastern men. What is the difference between these two cultures?

The middle western culture is built upon a substratum of rough, warm Methodism which urges upon people the primitive communal duties of doing good to one's neighbor, and aiding the neighborhood enterprise. The fund of energy and social

habit that was once drawn upon to bring together a quilting-party, a corn-husking or a log-rolling gathering is still available. It is used in the W. C. T. U. The Middle Westerner's sincerity in wishing to do good is equalled only by his awkwardness in doing it. The Easterner has a different spirit. He feeds his soul upon the leavings of an intellectual Unitarianism, a snobbish Anglicanism, or a frigid Puritanism, and none of these nourishes in him any hot zeal to improve his fellow-men. Wherever this Eastern culture predominates, the effectiveness of persuasion is low. The individual thinks of conduct in terms of "breeding," which is not transferred to anyone by a hortatory technique. The women prefer the D. A. R. to the W. C. T. U. There is a tendency for this Eastern type of culture to take possession of great cities, for the Middle Western type to linger longest in the small towns.

These two cultures are coming to hate and to fear each other. Never was the conflict more clearly demonstrated than in the last Presidential

election, in which Al Smith was cartooned to the Middle West as a city slicker, while Hoover was depicted as an honest farm boy who had made good. It is noteworthy that Prohibition has been most successful in the small Middle Western towns, that is, in precisely those areas where interference by means of discussion and exhortation are most effective, and least successful in the large Eastern cities, that is, in the areas which depend for social control upon litigation and prosecution.

The urban community, far more free from informal meddling by neighbors, is much more subject to police regulation than the small town. It is here that litigation flourishes. Whereas in a small town a lawsuit between two citizens over damages in an auto accident is a matter of public scandal, in a city it is a matter of course. The fire laws, housing laws, traffic regulations and licensing regulations have in the city a complexity and volume which the small town can avoid. It is often argued in connection with the problem of liquor control that modern life is requiring more

and more public regulation, and this is especially true of modern urban life. But it is noteworthy that liquor regulation has been most successful in the places where police regulation in general is least used, and where the police equipment is smallest. This fact leads one to question whether the penal laws have ever been the really effective agencies of liquor control, and whether the successes in reducing liquor consumption claimed for Prohibition are not actually a residual result of work once done on the persuasion level for temperance and abstinence. For on this level we are ready to admit that others may concern themselves with what we eat and drink.

Upon that level of human relationships where separateness is most highly consecrated, that is to say, on the level exemplified by the property right, it is usually easy to determine whether a given thing is or is not "any of my business." One can go to law about it. Every lawsuit is really a test whether a certain matter is or is not any of the plaintiff's business. The whole legal machine of

a modern state is occupied principally with the heavy task of marking out the limits which separate one citizen's business from another's.

Even a communistic regime must set definite spheres of responsibility and authority, and must define the relations of individuals to things and to each other in such a way that people know which actions are one's business and which are not. In a communistic state, or in a great organization of slaves, or in an army, these distinctions are likely to be even more rigid and definite than in a society which makes use of our more familiar property concept. The fact that the economics of division of labor requires specialized responsibility, so that each man shall have his own affair to occupy him, and none shall take it upon himself to meddle in the other's affair, is illustrated in any hierarchy or any organization. The Russian peasant on one of the newly established communal farms can say to a peasant on another farm, "It's none of your business how we do our planting," but he cannot say this to one of the members of his own *com-*

muna. But if in the course of the day one task is assigned to him and another task to his fellow-member, he can legitimately resent interference by the latter, and say to the meddler, "Mind your own business." The Soviet Government itself through its lawcourts or administrative officials must in the last instance be able to decide when the protest against the meddler is justified, and when it is not. In the same way an army court-martial will inquire whether such-and-such an officer was acting in line of duty when he gave such-and-such an order—was he in fact "minding his own business" or not?

If civil law in a modern state is the instrument for defining the limits of an individual's business, criminal law is chiefly important as a supplement to civil law. This fact is attested not only by the enormously greater volume of business that comes to the courts under the civil code, but also by the history of the law itself. The early Germanic laws from which our legal system is derived were principally devoted to the protection of private rights,

and were in fact privately enforced. The idea that the criminal had harmed the whole community was familiar only in connection with crimes of impiety and cowardice in war. If a murder was committed, the earliest legal result was that the relatives of the slain had the right to retaliate upon the relatives of the slayer. Then the community intervened by supervising a private transaction in which the offending family paid a *wergeld* to the kinsmen of the murdered man. The law which regards the murderer as an offender against the State, whom the forgiveness of the kinsmen of his victim cannot clear of the consequences of his crime, is a much more recent development. The old law still lingers on in the form of the right to damages which the dependents of a murdered man can make good against the murderer. The sections of the penal code which relate to thefts and frauds are even more directly based upon the prior existence of property rights defensible by private lawsuit.

The same thing is true with regard to auto-

mobile legislation. In the use of our highway system the reckless driver, the man driving on the wrong side of the road, the man who cuts in on another, is denounced by everyone on the road. He cannot successfully defend himself by saying that it is nobody's business how he drives his car. The line between what is his business and what is his neighbor's business has been drawn. The problem of how much freedom he has in using a vehicle on the highway has been threshed out in hundreds of thousands of damage suits. The other drivers on the road have rights which they can defend in court if any harm comes to them. And the police official supplements the work of the civil courts by interfering with those who overstep the limit already established. In the development of our institutions of social control the natural process requires that individual responsibility and freedom be first defined by civil law, and later given additional protection by the criminal law. In general people are more reluctant to accord a right of interference to a police officer than to a private

person who has been specifically wronged. Therefore, it might be expected that only in cases where a drinker had already acknowledged the right of injured persons to sue because of him would he concede the right of the police to interfere with him.

If we turn, then, to seek on the level where rights are analogous to property rights for the limit that restricts a neighbor's right to interfere with a man's drinking, or a man's right to drink in defiance of his neighbor, an amazing fact comes to light. This whole area of doubt is relatively unexplored by the civil law.

It is one of the most curious chapters in the history of liquor control that the extent and limitations of civil-law rights in drinking have never been adequately studied or adjudicated. The Prohibitionists did, indeed, concern themselves in the decision of one property-right question. It was decided that the owner of liquor-producing or distributing properties had no claim to compensation when the State destroyed their value. But the

whole theory of Prohibition pointed to the existence of other property rights to which no one ever paid sufficient attention. The prime symbol of the Prohibition campaign, from 1830 to 1930, has been the picture of the drunkard's wife. Here the argument against liquor was strongest. Did liquor control interfere with the personal liberty of the drinker? Yes, but it gave personal liberty to his wife. Without this idea in its doctrine the Prohibition movement would have died before it was born. Nobody knew how many dependents of drinkers were suffering from the bad habits of the husband or father; the estimates were always high, and there never existed any research machinery adequate to the task of checking them. But everyone knew that there were cases where liquor did this kind of damage. The anti-liquor movement mobilized in the defense of these injured parties. But it did not interest itself in their rights to compensation for damage suffered. It studied the property rights of the liquor-seller, and found them invalid; it studied the relation of

liquor-seller to the damage, and found him responsible for it; but it did not devote much thought to the property rights of the persons injured, or seriously try to enable the sufferers to collect compensation from those who were responsible.

This was the point at which the liquor movement got off the track. This was the crisis of the liquor control movement, in which the narrow preoccupations of the clergy crippled it for life. The enemies of the saloon wanted to put into jail the saloon-keeper, the owners of the industry, the drinker—anybody or everybody could go to jail, but they were not willing to begin by making the saloon pay for the damage it had caused.

This neglect in developing the civil damage aspect of liquor control is all the more remarkable because most states provided themselves with civil damage laws which laid the foundation for the adjudication of the real injury caused by liquor. These civil damage laws, creating a right of action against the dispenser of liquor in favor of anyone injured by an intoxicated person, were

invented in the 'fifties, and became standard in the various state codes in the 'seventies. The New York law, passed in 1873, is a sample of the type of statute which should have been the starting point of a healthy system of liquor law.

> Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, against any person or persons who shall, by selling or giving away intoxicating liquors, cause the intoxication, in whole or in part . . .; and any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages. . . .

These laws were used. There are leading cases interpreting them in the law reports of half the states in the Union. The principle was incor-

porated in many of these laws that a relative of a drunkard could serve notice on retailers, and after the serving of notice collect heavy damages for every sale. In New Hampshire the minimum damage the jury can award under the statute is one hundred and fifty dollars for each offense. The collection of damages under this law was secured by a right of recourse against property owners and bondsmen of the retailers. The principle was laid down by the courts that if damage resulted from a long spree, the whole amount of the damage could be collected from any one of the dealers who had sold liquor to the reveller, and it would be left for him to collect from other dealers who had been contributory to the same damage. Some of these laws were comparatively ineffective because they applied only to illegal liquor sales. There have been some awards under these statutes even since the passage of the Volstead Act. A Missouri case resulted in an award of $25,000, collected by the dependents of a man permanently injured by drink; a New Jersey case

recently resulted in the award of $12,000 where there was a death due to liquor. Now it argues strangely as to the interest which the Anti-Saloon League takes in matters of this kind that when a general complaint was raised against the use of poison in denaturing alcohol, the League generously offered to help dependents of persons killed by poison liquor by *prosecuting the bootleggers for murder*, but never, from its inception to the present day, has the League attempted to give real help to those who have suffered at the hands of the saloon-keeper, by sponsoring them in the collection of indemnities, nor even by propagating the information that these protective laws were on the statute books.

Indeed, any systematic work to bolster up and improve these civil rights would have deflated an enormous amount of Prohibition argument. The sob story about the parent whose boy had begun to loiter at the tavern to the loss of his soul and the destruction of his body, would have provoked the query as to why the parent did not resort to

the remedy the law gave him, and make the tavern-keeper pay so heavily in damages that he would close his doors to boys. The Massachusetts law gives this right of action in favor of parents, and provides that the liquor-seller cannot offer as his defense that he did not know the buyer was a minor. The heart-rending tale about the drunken husband whose children were in need of food would have come to an ineffective ending if the conclusion had been that the wife, with the legal advice offered her by some Anti-Liquor Society, had obtained enough money from the saloon-keeper to buy food and clothes for the whole family for the year, and the saloons of the town had blacklisted her husband and refused him entrance. There are cases under the Civil Damage Laws establishing the right of the wife to compensation not only when the husband's drinking habits have diverted money from the family to the saloon, but also when the husband's ability to hold a job has been diminished by drinking. There are laws providing that when a man is in

jail because of crime committed under the influence of intoxicants, the seller of the liquor must support his family while he is in jail. Every branch of civil-damage legislation killed a branch of the argument for Prohibition. The more effective the civil-damage legislation was made, the less justifiable would become the indiscriminate interference involved in Prohibition. The development of these two liquor control programs were therefore alternative rather than supplementary to each other, since the success of the civil-damage system would preclude the possibility of obtaining the passage of a Prohibition law.

Moreover, the passage of Prohibition laws defeated the purpose of civil-damage laws by destroying the property responsibility of the liquor-seller. A right of action against a bonded liquor-dealer, with recourse against the owner of his premises as well as the bondsmen, is a valuable right. A right of action against a bootlegger is usually worthless. The trend of liquor-control

legislation in support of the civil-damage laws would have been to increase the financial responsibility of the liquor business, instead of driving the whole industry underground. Just as the development of the civil-damage laws would have precluded the enactment of the Prohibition laws, so the enactment of Prohibition almost nullifies the application of the principle of civil damage.

The Prohibition law itself suffers from the fact that civil-damage laws were not allowed to grow to maturity. Although the history of law, in everything from the law against murder, at one end of the scale, to traffic regulation, at the other, witnesses the prior establishment of limits upon private rights, and the subsequent entrusting of public authority with penal powers to cause these rights to be respected, nevertheless, our liquor legislation never passed through the right-defining stage. It is, therefore, quite natural that, aside from recognized rights of discussion and persuasion, there is no commonly-accepted view as to when it becomes someone else's business what

a man may eat or drink. And without such a consensus, it is quite as one might have expected that the law empowering police officials to enforce rights which are not in themselves acknowledged or clearly defined, would lead to endless confusion.

The preachers and women who pushed the liquor-control problem directly from persuasion methods to criminal-law methods, without passing through the preparatory stage of civil-law definition of rights, were acting in an ignorance that is easily explained, not only by their lack of professional qualification to understand the principles involved, but also by the prejudices of the age in which they formulated their views. It was an age in which the concept of absolute property right as the converse of an absolute right of individual freedom ruled legal and political thinking. A man could get a legal education in those days by reading Blackstone's *Commentaries*. The problem of slavery and of liquor control both presented themselves to these minds in the same terms: a given kind of property is wicked, and must be

abolished, or else it is rightful and must be protected. In the history of jurisprudence the men of that day might have found other ways of working away from slavery than Abolition. Perhaps the other way would not have been equally good, but it was at least worth studying. They might have tried gradually to increase the legal rights of slaves, protecting their persons against corporal punishment, then giving them the right to acquire a personal property and protecting it by law, gradually limiting the right of master over slave until the institution was transformed through serfdom to freedom. The evolution of slavery in Roman civilization might have suggested these ideas to them. We are surprised, not that the men of that day failed to do these things, but that they did not even think of them, or discuss them. As a matter of fact, the only solutions they seriously discussed were confiscatory emancipation and compensated emancipation. The parallel between Abolitionism and Prohibitionism is not to be overdrawn, but the two are alike at least in this

respect, that they could draw from their age only a very limited supply of legal and political ideas, and only one idea about property: that it was either entirely right or entirely wrong.

It does not appear that the civil-damage laws were looked upon as providing a starting point for liquor regulation and control. They seem rather to have been intended to satisfy particular grievances. That a liquor-control regime might emerge from them seems not to have occurred to anyone who was interested in the problem. Dr. Cherrington, General Secretary of the World League Against Alcoholism, in an address on May 22, 1930, described the "nine principal programs advocated by the Drys in the interest of mitigating the evils of the beverage alcohol traffic during the past century." He did not mention the civil-damage laws among the nine. Nevertheless, these laws had in them the germs of all acceptable liquor-control systems because they made the distinction between innocent and noxious uses of liquor clearer, instead of obscuring it, and they

defined those instances in which it literally becomes another person's business what I eat or drink.

In describing the circumstances under which it can become the concern of a third party how a man may eat or drink, the civil-damage laws begin with the most obvious and direct kinds of damage—namely, damage to person, property and means of support. They specify certain relationships wherein damage of this kind is most likely to ensue, namely, those of husband to wife, parent to child, and employer to employee. The man who beats his wife when drunk or spends all his weekly pay check in the saloon or loses his job because of his drinking habits has forfeited his right to say that it is no one's business what he may choose to drink. Public opinion goes easily along with the civil-damage laws to this point. There are other situations in which the right of meddling in another's drinking habits is less clear. A case came up under the civil-damage law in which a farmer sued a liquor-dealer for the value

of a horse lost through the negligence of a drunken hired man. But perhaps the hired man would have been negligent even though sober. Are employers to have the right to regard themselves as damaged by any diminished efficiency in their workmen which they attribute to drink? But they have another remedy for such damage in the reduction of wages or the discharge of the offending workmen. If the workmen are docked or discharged, their families have a right of action for loss of support due to liquor. Clearly, there are borderline cases where the extent of a third person's interest in a transaction between a liquor-dealer and a drinker is ill defined. Where damage to "person, property or means of support" is involved, the chief difficulty is to lay down the rule as to just how close must be the relation between the drink and the damage in order to create a legitimate right of intervention.

There is another type of damage suffered by third parties in the transaction between a seller and a drinker. This is the moral and psychologi-

cal damage which appears when liquor enters as a factor in family disorganization. The feeling of a wife disgraced by her husband's habits, or the mental distress which accompanies family friction due to drink, or the suffering of a parent whose child is learning drinking habits of which he disapproves—all these are acknowledged by enlightened opinion as very real grievances, because the family has a right to a certain moral solidarity. The civil-damage laws never gave very extensive recognition to these rights. They did not allow any rights to indemnity for intangible losses, except indirectly, in the right which parents received to sue dealers who sold to their minor children, and the right that lay in any member of a drunkard's family to protect him from temptation by serving notice against selling, and suing any dealers who sold, to the designated family member.

This consequence of the moral solidarity of the family is acknowledged by public sentiment even where the law does not give it recognition. The

following notice was clipped from the *Grant County Press* of Petersburg, West Virginia, by the indefatigable editor of the *American Mercury:*

> All Moonshiners and Liquor Handlers are hereby warned not to give or sell my father, Sam Self, a drop of liquor in any shape or form. All parties not heeding this notice will be dealt with according to law.
>
> JACK SELF.

The private wrong which is heard in this press notice demanding its remedy speaks more distinctly than the criminal code, because its right to speak is more widely admitted. Intervention between buyer and seller of liquor under these circumstances by a member of the family involved is not regarded as a violation of personal liberty. The civil law has no difficulty in identifying these cases, because the connection between the drinking and the damage is explicit and direct. The difficulty arises rather in estimating the amount of the damage.

There is also a type of property interest and

a type of moral interest which the community can claim upon ordinary principles of equity with regard to the drinking habits of its members. If a man becomes a pauper through drink, or if he becomes an object of police action because of intoxication, the community has a property interest in the matter. The civil-damage laws were not drawn to permit the town authorities to sue the liquor-dealers for the cost of maintaining pauperized drunkards, but the claim is quite within the logic of the principle. Intoxication in a public place, since it endangers the public peace, is also an acknowledged basis for interference by the community.

When it is conceded that a man's drinking habits may become the business of another person because of damage to the material interests of any person or of the community, and because of injury to the moral interests of his own family, there is still another kind of interest which is asserted by those who answer affirmatively the question, "Am I my brother's keeper?" A man who has no

family, who cannot harm himself by drink because he is a total abstainer, who is not responsible for the welfare of any children from whose vision he wishes to have liquor banished, will still claim an interest in another man's food habits on the ground that liquor is harmful to mankind. It is not harmful to himself, for he drinks none of it; he has himself suffered no damage for which he could hold drinker or purveyor liable. If liquor legislation had been worked out patiently through the development of civil law this man would never have made himself a place in court. He would have been told that so long as his object was the improvement of his neighbor, not the protection of himself and family, the level upon which he should work was the level of persuasion. As things stand at present, we have no way of knowing what proportion of the forces backing Prohibition consist of people who are trying to do good to people who do not want to have good done to them. It is this kind of interest that makes Prohibition a "noble" experiment. If the liquor regime were

based upon machinery for redressing actual individual grievances, and satisfying real claims for personal damage, it would at once be less noble and more stable.

It appears now, in our present experience, that the law relating to the use of liquor neglects that principle of specialized responsibility, of correspondence between qualifications and privileges, which is axiomatically applied to our productive economy, and which is an expression of one of the principles underlying the organization of society —the principle of specialization or division of labor. This lacuna in the system of liquor control appeared when the transition was made directly from intervention on the level of persuasion to intervention on the level of police compulsion, without passing through the preparatory stage of defining the extent of an individual's right to drink, and clarifying the nature of the interests which a third party may claim in a transaction between a buyer and seller of liquor. Had the law passed through this stage, it would have

accommodated itself to the elementary fact that some people use liquor without abusing it, while others do not. The law would then have worked out a very definite and acceptable answer to the question whether, under such and such circumstances, it is anybody's business what I eat or drink.

Modest Proposal for Responsible Drinking

It is the principle of our modest proposal that the liquor industry should be made liable for all the damage it does, that the uses of liquor which create damage should be separated from those which are innocent by the simple device of giving damaged persons adequate rights to recover against responsible defendants.

We have successfully made use of this principle in developing the legal control of many of the newer instruments of civilization. It is a natural principle to apply whenever a given thing is capable of being used either innocently or harmfully. The application of the principle is illustrated in many branches of the law, such as employers' liability, or carriers' liability laws, or

anti-trust legislation. For reasons which have been developed at some length it is a principle peculiarly in harmony with our juridical and political organization.

To draw up in full all the details of the proposal at the present moment would be to violate one of the objects of the proposal itself, which is that the law should grow with experience, and should reveal a constant adaptation of means to end. This elastic quality of the proposed system of liquor law can be illustrated if the history of our legal treatment of the automobile is compared with the history of liquor legislation.

Prohibition vs. Responsibility in Motoring.

The automobile found its place quickly and easily in our social and legislative system. One might suppose that since liquor has been with us so long, and its dual qualities have been so long known to us, it would be acceptably covered by appropriate legislation, and that the tensions and strains would have been encountered in making a

place for the automobile. Exactly the reverse was the truth, because the wrong legal principles have been applied in trying to regulate liquor, the right ones in regulating the automobile.

The automobile and liquor both lend themselves either to use or to abuse. Both can be dangerous, demoralizing, wasteful of material and human energy; and both can be pleasurable and profitable. In both cases a commercial or industrial use is sharply distinguished from a recreational use. It would be possible in both cases to fix one's attention upon the recreational use—pleasure riding or beverage alcohol—and to concern oneself especially with wrongful or noxious intemperances in uses of this class.

Liquor control, whether by Moslems or Methodists, gave all its attention to the repression of harmful uses of liquor, and did not concern itself with the development of innocent uses. That there were innocent uses was admitted in both cases. The Moslems may read in Verse 216 of the Second Surah of the *Koran:*

> "They will ask thee concerning wine and games of chance. Say: In both is great sin, and advantage also, but the sin is greater than the advantage."

The Methodists can read in their Volstead Act that liquor is properly to be used for medicinal purposes, and the twenty-ninth section of their law hints vaguely at innocent drinking of home fermented wine. But instead of seeking to substitute good uses for bad ones, Moslem and Methodist alike are willing to impose a dogmatic solution destroying the good uses for the sake of getting at the bad ones. In both cases this oversimple remedy has created tensions and raised protests which blare at us every day in the newspapers, and which come floating down to us from the past ages in the verses of Omar Khayyam. In neither case was the regime a complete success. The wealthy Moslem in the privacy of his home still serves the forbidden wine, justifying himself with some careful casuistry. The casuistry of drinking under the Prohibition regime in America has become as elaborate as the ritual of hospi-

tality of which it forms a part. Such procedures evidence a faulty juridical situation. But the law relating to automobiles developed differently. Its primary object was always to make distinctions of degree, protecting the independence of the innocent user, and holding the culpable user responsible for his acts.

The automobile was not saved from antipathy and persecution by its intrinsic merits. If the attempt had been made to kindle fanatical attitudes of antagonism against the motor car, and to blame it as the source of vast and vague social and personal evils, the case against it could have been made as strong as the case against liquor. If legislation had been drawn up under the inspiration of such antipathies, and had then become fixed as a dogma, a "moral issue," the resulting tensions would have been comparable to those which the Prohibition laws produce.

The indictment of liquor could be applied count-for-count to the motor car, if only we had the desire to do so. The indictment of the saloon

on religious grounds, which led to the Sunday closing laws as the first series of regulatory enactments, is much better found against the motor car than against liquor. For the saloon drew from church attendance only the men, while Sunday joy-riding takes the whole family away from the house of God. The case against liquor on moral grounds is weak and flimsy compared with the case against the automobile. Our standards of sex conduct, even in their most severely Puritan form, were created and transmitted to us in societies which used liquor habitually. It is therefore absurd to say that they are incompatible with the use of liquor. Seduction in a saloon, however effective as an anecdote to hold the breathless attention of the sex-starved Prohibition audience, was in fact rare enough to be accounted a good incident of melodrama. Seduction in an automobile is too commonplace for melodrama. The incident in which the girl is given the option of surrendering or walking home is accepted in our literature as a mild and standardized joke. Our

sex morals stood up under centuries of liquor, but broke down with two decades of motoring.

But if we speak of demoralization as something more general than the lapsing of female chastity, the case against the automobile becomes even stronger. For here one finds the prime agency in the demoralization of family life. The survey of Middletown showed that most friction between parents and children is caused either directly or indirectly by the automobile: directly in matters connected with the use of the car or the family policy of purchasing cars, or of permitting the children to own cars; indirectly in the question of the participation of the children in a social life organized around the use of automobiles. And, added to these immediate causes of dispute between parents and children, is the growing independence of the youths and maidens who by the mere control of distance can elude parental authority. In the relations of husband and wife it appears that the automobile is a disorganizing factor. Professor Roland M. Harper of the

University of Georgia, writing in the *Eugenics Magazine* in May, 1930, presented statistics and correlations to establish a close connection between automobile-owning and divorce. He said:

> "Near one extreme at the present time is California, with about one automobile to every three persons in 1929, more than one car per family; one divorce to every 3.3 marriages . . . . . near the other extreme is Georgia with about one car or truck in 7.7 persons in 1929 and one divorce in every 14 marriages."

The kind of statistical method which has been applied to the liquor controversy could do marvels with such material as this. And facts of common knowledge would confirm the view that family discipline survived the industrial revolution and the factory system, but came to grief when the automobile appeared.

It is the automobile, moreover, which has given the criminal a technological advantage over the agencies for the suppression of crime. Violence and brigandage of a type once to be met with only

in frontier areas, where the police organization of the modern state had not been set up, now comes back into the most highly policed cities. The criminal can count on getting away from the scene of the crime so quickly that pursuit is vain. The murderer can be across two state lines before his victim's body is cold. The police authorities are helpless with their local jurisdictions and their limited responsibilities inherited from a time when criminals were run down with the hue and cry. The police organization availed easily to apprehend criminals whose offenses were due to liquor. But the modern criminal works when he is sober and uses a high-powered car. The decades of the twentieth century which saw the simultaneous advance of Prohibition and the automotive industry saw not only an increase in criminal activity, but also an increase in the elusiveness of criminals. Liquor crime was never as much of an evil as automobile crime.

The demoralization which is the characteristic quality of automotive civilization is manifested

not only in the moral but also in the economic sphere. For the automobile has notoriously and continuously caused people to make expenditures they could not afford. The sacrifice of more substantial things for the sake of an automobile has been a scandal ever since the marketing of machines on the installment plan was begun. This is more serious than the unwise expenditure fostered by liquor because the amount is larger, and the mortgage on the future more oppressive. And when there comes into the reckoning the use of the car as a mere index of rank in the community, for the value of the prestige it gives, the wastage is so excessive as to dwarf by comparison the losses that used to be charged to drinking, when one maintained his prestige by "treating" his companions. The wastefulness of automobiles is great enough from the personal standpoint; from the social point of view it is scandalously prodigal. The junking of cars that are not half used up, and the making of cars that are to be used to answer a fashion need rather than a trans-

portation need are intolerable practices that none but a spendthrift society would permit. The drain is made not only upon the energies of labor and capital, but what is more important, upon the irreplaceable natural resources of the country. The liquor industry used only the products of the soil, perennially replaceable, but the automotive industry is gutting the continent of oil, coal, and metals at a rate which our posterity will not condone.

There is certainly an economically justified commercial use of automotive transportation, which critics of the automobile should take into account, just as critics of liquor take into account the commercial and industrial uses of alcohol. The wasteful public is the joy-riding public. But the joy-rider gets no true pleasure from his ride, any more than he gets pure air from his outing. Auto-riding is to walking as wine is to water; it exhilarates only those whose natural healthful tastes are spoiled. The fresh air which is thought to be within the reach of the motorist reeks with

carbon monoxide. To get really fresh air one must walk far from the highways. But with the decrease of walking, and the disappearance of footpaths, there are no longer any places for pedestrians except the perilous and poisonous edges of the highways. Thus the automobile has taken away our birthright of health. For automobile-driving is not only intoxicating; it is also habit-forming, and the habit spreads so rapidly and takes hold so firmly that millions of men, once normal healthy human beings, are now so circumstanced that they will never walk for pleasure again.

It is impossible to calculate the exact extent of the damage to health ascribable to the automobile, but that small proportion of the damage which can be established statistically is already appalling. This is the death rate from automobile accidents. Whereas alcoholism accounted for a death rate of six per one hundred thousand in 1900, and accounts for four today, the death rate from automobile accidents stands at twenty, and

is steadily rising. An American is five times as likely to be killed in an auto accident as to die of alcoholism. But the death rate from accidents tells only part of the story, for there are countless injuries, more or less serious, and more or less permanent, taking their toll of human happiness every day.

This indictment of the automobile uses no new nor unfamiliar material. The most important counts are already widely discussed. But they are never brought together to make a case for the prohibition of automobiles. There was a time, early in the history of the industry, when widespread public antipathy to the motor car was manifest. Juries were merciless; speed laws were oppressive and ill adapted to the mechanical needs of automobile operation. The expression "joy-riding" threatened to take on a meaning conveying reproach. Many a teamster cursed the horseless carriage with a full heart. The farmer whose chickens were run over boiled with rage. But this attitude of hostility died down rapidly because

the automobile paid its way, the law was intelligently developed to discourage abuses but to encourage rightful use of the new invention, and a large automobile-owning public appeared. A way was found to maintain *responsible driving*.

The importance of identifying car and driver in order that responsibility for damage might be fixed led early to the visible license plate. For a long time it was assumed that anyone who owned a car was likely to be wealthy enough to pay compensation for any damage he might do, but when this ceased to be true, legislatures began to study projects for compulsory public liability insurance. Since the automobile owners were using the roads heavily, and demanding more and better roads, taxation was devised by which they could pay for what they wanted. As the increased weight of traffic on the roads and the improved condition of the roads created serious traffic problems, these were studied without prejudice. The old principle that safe driving was necessarily slow driving was discarded, and it was found that on certain

highways the slow driver, not the fast one, was the dangerous man. The common sense distinction between the careful driver and the negligent one had received all along its due legal recognition; the former was protected and the latter mercilessly subjected to civil and criminal penalties. The system of licensing drivers was introduced in order that persons unable to drive safely might be kept off the roads. Systems of car inspection are now being worked out which will diminish the risk of accidents due to bad mechanical conditions in a car. The technique of traffic control is being mechanized and standardized, traffic signals are becoming better known, and the relative rights of those who wish to park their cars beside the road and those who wish to keep a broad highway clear are being adjusted on principles of maximum social good. Legislation keeps in touch with enforcement possibilities, and both are in harmony with the system of civil-law liability. The driver who has no accident and violates no traffic rule is never asked about his driver's license. The man

who suffers damage while driving on the wrong side of the road prejudices his right to collect compensation. The most serious criminal offense is the failure to stop after an accident, for the hit-and-run driver is escaping from civil liability for his conduct. There is constant experiment with automobile regulation; public opinion provides a continuous flood of criticism; the law never becomes committed blindly to a dogma. This branch of our law is a living and growing thing which adapts itself to its environment; the liquor law, on the contrary, is dead.

The Principles of a Living System of Liquor Law.

A living system of liquor law could grow from very modest beginnings. As in the case of the automotive industry, the attempt might be made to make the industry pay its way. This attempt, consistently followed, would lead to the evolution of a whole system of law, a few elements of which it will be possible to suggest by way of prophecy. There is no need for a special and exceptional

theory of liquor control; it is necessary rather to cease thinking of liquor as a special and exceptional subject, and to make a thoroughly competent attempt to apply to liquor the principles of human relationship which are found throughout our legal system.

To be subject to abuse as well as to innocent use is so common to material things that the peculiar problems of liquor control do not derive from this aspect of the nature of liquor. The peculiarity about liquor is rather that the damage which results from its abuse is not easily indemnified. The man who uses liquor to the harm of another person is often unable to make good the damage. If the injury is done to a member of his family, then it is impossible for him to make amends by paying for the damage, for that is only robbing Peter to pay Paul. Sometimes the essence of the grievance is poverty induced by drunkenness, in which case no indemnity can be found so long as there is only the pauper to pay it. Therefore, just as recourse in industrial accidents has

been shifted from the "fellow servant" who actually causes the accident to the employer who is actually innocent, so in liquor law, recourse for damage done must be shifted from the drinker to the dealer in liquor.

To shift the incidence of liability from drinker to dealer is the first step in applying ordinary principles of civil justice to the problem of liquor control. It is necessary, of course, to make sure that the dealer will be solvent, and able to indemnify any damage done by his liquor. And beyond that a special type of control is demanded, comparable to the licensing of automobiles and drivers. For it will be necessary to establish such a definite connection between a particular drinker and a particular dealer that the procedure of finding the dealer responsible for any item of damage will be simple and direct.

If we, then, pick up the old civil-damage laws where they were left by public indifference a generation ago, the next step in their development is marked out for us. The liability placed upon the

seller must be made effective. As to how it can be made effective, the history of the automobile industry suggests the end, and the organization of the liquor business under the Volstead Act foreshadows the means.

In the history of our civilization the theme is recurrent that a doomed institution, in fulfilling the conditions of its own inner development, prepares for the new institution which will take its place. Feudal society created the condition which made democracy possible, just as tribal society had created the conditions that made feudalism possible. The ponderous trend of history seems to move toward its destiny with complete contempt for our shouting and explaining and theorizing. The First French Republic, while sputtering its hatred of monarchs, carried France forward in the thoroughly monarchical policies of internal centralization and foreign expansion for which the monarchs themselves had striven. One of the greatest of modern economic historians[1] believes

[1] Max Weber.

that negro slavery in the South would have developed naturally, without the intervention of violent abolitionist action, into the same system of semi-serfdom by negro renters, share-farmers and farm laborers in which the contemporary South has brought its agrarian economy to equilibrium. The movements of industrial expansion, consolidation and super-organization which are directed in America from Wall Street, in Russia from the Kremlin, shout out against each other as if they were mortal enemies. The time may come when we will regard them as two examples of the same trend which worked out their common destiny together, regardless of the system of names by which men chose to call them.

The development of the liquor industry under the Prohibition regime assumes from this standpoint a curious aspect. It seems to have been preparing itself for control by civil-damage actions, even while the shouting on both sides ignored the civil-damage principle entirely. The legal and illegal branches of the liquor industry

developed parallel systems of registration and control, tightening the nexus between buyer and seller. The lawful dealer in liquor made his register of sales and customers in compliance with the Volstead Act; the illicit dealer kept his list and scrutinized his customers carefully to avoid undercover agents. The lawful purchaser got a permit or a doctor's prescription; the illicit buyer had a bootlegger's card. *The net result in both cases was to set up the very type of machinery of administration which the principle of civil damage, developing without the interference of Prohibition agitation would have been required to create.* Perhaps there is a subtle destiny which, in ruling that the clear definition of rights must precede their effective protection, mocks the plans of Wets and Drys alike.

The Drinkers' Registration and the Dealer's Bond.

A system of responsible drinking could begin with the equipment already in existence: the civil-damage laws on the statute books, the arrange-

ment for the bonding and for the guaranteed financial responsibility of liquor dealers under the revenue laws, and the registration devices worked out under the permissive section of the Volstead Act and in the informal folkways which govern the relation of bootleggers and patrons. These elements need not be invented; they require only to be combined and standardized in a registration system with the double object of making possible the tracing of any liquor damage to some definite dealer, and assuring the ability of the dealer to pay for the damage caused.

Liquor registration cards would be issued ordinarily to any adult. Under the present system a man who wants liquor gets a special kind of permit or introduction for every type of use. For manufacturing, a permit from the Prohibition administrator, for medicine, a prescription from a physician, for drinking at a party, an introduction to a good bootlegger. The procedure in establishing relations with a bootlegger is not standardized, and is usually quite as simple as the proce-

dure in establishing relations with a bank. One receives a number or a signed card or has his name entered in a book. The procedure under the Prohibition administration on the contrary is quite complex. The following rules are quoted from Page 69 of Treasury Department Regulations No. 3, issue of 1927:

> If the application is approved by the administrator he will endorse his approval on three copies of form 1447 and before issuance of permit, will forward such copies, with reports of investigating officers, all supporting documentary evidence submitted with the application and the duplicate bond, to the commissioner, except in case of renewal of permits now outstanding. The fourth copy of Form 1447 will be retained by the administrator to be used for preparing verified copy for transportation purposes. . . .

(The purchaser is still a long way from having his alcohol even when he has the verified copy of Form 1447.)

The effect of standardizing registrations would be to increase somewhat the formality of the regis-

tration of the beverage purchaser, and to simplify some of the rigmarole which the purchaser for other purposes must go through. The issuing of cards and registering of names, instead of being divided between bootleggers and government officials, would be concentrated in the hands of the officials.

The prospective purchasers of beverage liquor, in accordance with established customs, would naturally get themselves introduced to liquor dealers. The liquor dealers would be hesitant to sell to strangers, for reasons which will presently appear.

The dealers, on their part, would also combine the two present systems of organization and discipline into one. There is at present one class of liquor dealers heavily bonded, registered by the government, and kept in line by the threat of revocation of license. The other class of dealers, especially in the cities, participate in an underground organization which is more highly disciplined in some respects than legitimate industry.

The penalties for disregard of the rules are often more severe in the illicit organization than in the legal one. The non-conforming bootlegger may lose his protection and go to jail, or he may be "taken for a ride." A unified registration system covering both the industrial and beverage industries, and under the control of the government, would divert to more socially useful channels the sums now paid for racketeering and graft.

Then these two registration systems, of dealers on the one hand and drinkers on the other, must be coordinated. Two devices for coordination suggest themselves. One of them resembles the method used in controlling the retailing of poisons: every purchase must be recorded and signed for in the dealer's register. This is the system used in the industrial alcohol business under the Volstead Act. The other device resembles the method used in banking operations: each drinker has a definitely established connection with a dealer who knows and trusts him. The mutual confidence developed between bootlegger and drinker, in which

the seller trusts the customer not to betray him, and the buyer trusts the bootlegger not to poison him, resembles somewhat the relationship of confidence necessary in financial operations. Whether the coordination of the registration of purchaser and dealer is to be patterned on the example of the legitimate or illicit trade is of no consequence, provided the end is obtained that for every liquor purchase there is some definitely responsible and solvent sponsor able to pay for all the damage the liquor may do, and provided that the procedure for establishing this responsibility be simple and direct.

The categories of damage for which the liquor dealers will be held liable can begin with those which are set forth in the existing civil-damage laws. They might properly be extended to cover damages in the moral and psychological category. The statutory rates of damage should be high enough to render the actual pursuit of the rights of aggrieved parties a practicable and even a profitable undertaking, and to make the avoidance of

damage suits the first endeavor of the liquor dealer. The most prosperous dealer would be the one who had the fewest claims against him; it would hardly be a sound business policy for him to take money from men whose families were suffering for lack of it, or to sell liquor to a person likely to get drunk, or to sell to minors. A good method for working out the categories of damage would be the following: take a package of propaganda literature of the Anti-Saloon League and an equal package of the literature of the Association Against the Prohibition Amendment. Make from the Anti-Saloon League literature a list of all the types of damage alleged to be caused to innocent parties by drinking in the saloon, and from the other literature a list of all the types of damage which are said to result directly from drinking under Prohibition. These two lists would be the basis of the statutory schedule of indemnification. To keep the law nicely adjusted to its purpose, both as to matters of substance and matters of procedure, would be a problem requiring constant

study and experiment. The result would be a healthy growth of a sound legislation which would not only conform to the convictions of the mass of the people, but would create vested interests committed to its perpetuation and development.

There would certainly spring up a whole race of rascals who would endeavor by various frauds and wiles to create fictitious rights of action against liquor dealers, just as accident sharks make money by suing traction companies. The liquor-dealers would protect themselves against these tricksters in exactly the same way that speakeasies protect themselves against prohibition agents, or grocers against bad credit accounts. Such a situation might render it as hard for a stranger in a town to buy liquor as it is for him now to cash a check. The situation would, in this respect, be a new adaptation of the one with which we are already familiar: that scoundrels assist in the enforcement of the law. The activities of these "confidence" men would render the running of the old-fashioned open-house saloon both risky and unprofitable.

The inconvenience resulting from the registration requirements would sit lightly upon people who were in their own communities, but would become galling to the traveler. The principles of the modest proposal indicate, however, that anyone willing and able to pay all the costs that may result from his conduct should be permitted to assume the risks of his drinking, and to relieve the dealer of liability. The method used might well be the posting of a bond to cover the dealer for all costs arising under the civil-damage laws. A certificate not unlike a letter of credit could be issued upon this bond, increasing the drinking freedom of those who were able to pay for it. This is a perfectly logical element of the plan, because the only reason for shifting the incidence of the liability from drinker to dealer was the imputed inability of the drinker to pay. The regime would thus prolong indefinitely into the future the advantages in drinking which wealth confers at present. The difference would be that whereas under the present system wealth enables a man

more effectively to evade the law, in the future it would enable him more effectively to comply with it.

The problem of enforcement under these conditions would be primarily the problem presented when some damage recognized as such in the statutory schedule should result from drinking, and yet there should be no way of tracing the damage to its source. The logic of the system would require that even in such a case the injured parties should be indemnified, possibly at the charge of a fund maintained by the whole liquor industry. But such cases of untraceable damage could not occur except where there had been an evasion of the registration laws. And such evasions would be penalized, whether drinker or dealer were the guilty party.

Certainly there will be bootleggers and blind pigs just as there were in the old days of the licensed saloon, and just as there are under Prohibition. But they will be more easily dealt with than they were in the old days because of the

double segregation of legitimate from illegitimate drinker as well as legitimate from illegitimate dealer. Public opinion will defend neither the drinking rights of those who cannot drink responsibly, nor the selling rights of those who seek to evade ordinary civil liability for damage. The energies of the police will be focussed upon that part of the drink problem which really requires police attention, namely, the noxious conduct of the intemperate drinker and the irresponsible dealer.

The profit in bootlegging will be ruinously reduced. The responsible and legitimate dealer, with his register of patrons, his sales book and his bond for the satisfaction of claims against him, will have the most profitable and valuable trade. And if irresponsible retailers spring up to peddle liquor to people whom no responsible dealer would trust with it, their course will be more difficult than that which lies before the present day bootlegger. They will have no rich clientele. If any of their patrons become drunk or cause damage, they are likely to

be discovered and punished. The wholesalers will not only refuse them supplies, but will try to run them out of business because every damage claim which arises out of unregistered drinking will be levied upon the industry as a whole. Not only will they lack the support of public opinion, but they will have no access to "important money," and no cooperation from the large-scale industry.

"Enforcement," and Possible Development toward Limited Prohibition.

It is at this point that the police power enters the scene. It gives its aid to the maintenance of discipline in the liquor industry, and serves the most wealthy branch of the industry, as at present. But it will be acting within the law rather than contrary to it. The unregistered and illicit dealer would occupy in the trade the uncomfortable position of a speakeasy proprietor who has not seen the right people or paid the right protection.

The enforcement of the registration of drinkers

would resemble the enforcement of the laws requiring drivers' licences. There would be no prowling breath-smellers asking people to show their papers. But if something should happen calling for police protection, and liquor should be involved in any way, the normal thing would be to ask for the display of one's drinking license. When the neighbors call the police to quiet a party, or when there is an accident on the street and someone involved has liquor on his breath, or a complaint comes into headquarters about disorderly conduct, then the drinker who has not registered will find himself in trouble. If a drinker should be unregistered for the whole length of his life, but should never cause any harm to any other person by his drinking, nor become involved in any incident of disorder, the evasion of the registration law would not defeat the general purpose of liquor regulation. The total abstainer would not need to trouble himself about the regime; the moderate drinker would prudently provide himself with a card as a protection against annoyance if

occasion should arise for its production. The toper would find the regime an inconvenience, just as the reckless driver regrets the existence of the driving license system.

Police interference to prevent unregistered drinking would be in the background of the liquor policy; the pressure of ordinary business interest would be in the foreground. This is the same kind of restraint that makes it difficult for the man without money in the bank to cash a check. The police stand ready to arrest him for forgery if he succeeds in cashing it. This may be an effective deterrent. But even more effective is the unwillingness of people with money to advance it in large amounts to unknown persons upon a personal check. A stranger to our civilization who should see someone make a purchase and sign a check for it might wonder how restrictions could be invented to keep anyone from signing and negotiating checks of any amount whatsoever. The forger's ability to cash a check is limited primarily by the financial and economic system and only in

the second place by the activities of the police. So also the most effective limitation upon the purchase of liquor by drunkards would be the establishment of a system which made it profitable to sell to moderate drinkers, and costly to sell to drunkards. Toward the creation of such a system the civil-damage laws point the way.

If, then, at some future time it should be desired to introduce the principle of direct police supervision over the conduct of drunkards, the drinker's register would serve as a starting point for such an enterprise. The revocation of permits could be imposed as a consequence of misuse of liquor. The distinction could then be made systematically in criminal law between noxious and innocent uses of liquor, and between the moderate drinker and the toper. Such a police regime would tend to develop toward Prohibition for some persons, but not for all.

The principle that the government may discriminate between its citizens, extending to some civil rights which it denies to others, is already

practiced in many departments of political life. The permission to carry firearms is regularly controlled by the State in such a way as to deny permits to those who, in the opinion of the authorities, would make wrongful use of their weapons. The regime governing the issue of automobile and aeroplane operators' licenses is intended to protect the public from unskilful drivers. The only objections to the extension of this principle are administrative difficulties, not political principles.

If the State possessed the administrative machinery to carry its desires into effect, there is almost no limit to the use that might be made of the principle of the legal distinction between the qualified and unqualified person. The censorship problem would disappear if it were possible to give prospective readers a purity test. A man who wanted to read *Candide* or *The Decameron* would have only to provide himself with the necessary credentials. This regime is already in existence with respect to certain classes of books sold only to doctors and lawyers. There are some who argue

that intelligence tests, aptitude tests, and perhaps sanity tests should be more generally given, so that it would be possible for the average citizen to prove by documentary evidence his intelligence or sanity. Certainly the capacity test for drinkers would be a useful addition to the list of legally established inequalities before the law. And the system of responsible drinking would in fact operate as a capacity test, which could be utilized for police purposes. The system of responsible drinking is not essentially police-controlled except in its registration features, but it offers the prospect of developing the basis of a reasonable type of police control if the evolution of the legal system should come to require it.

If the development of direct police intervention in drinking should happen to take the road toward partial Prohibition, it would find the traces of earlier legislation along the way. For the liquor regulation policies of colonial times, insofar as they concerned themselves with the problem of drunkenness, were invariably based upon distinc-

tions of persons. In colonial Boston it was against the law for the innkeeper to sell to a toper, and for the toper to buy. Prohibition against the sale to Indians, one of the few relics of the older type of legislation that has survived, was a common regulation in colonial times, and is still a Federal law. Prohibitions were also directed against the buying of liquor by apprentices or slaves without the permission of the master. This type of prohibitory law was undermined in the movement toward equality of rights of which Jacksonian Democracy marks one crisis, and the Emancipation Proclamation another. The present intent of some of the nullifiers of the Prohibition law, and the probable intent of some of the voters and legislators who passed it, was to reproduce a control of this type. There is a difference, however, between restrictions based on class distinctions and retriction based on individual qualification. Responsible drinking, if it ultimately develops into a type of limited Prohibition, will be more consistent with equalitarian ideals than were the old laws against liquor-pur-

chase by apprentices, indentured laborers and slaves.

Any liquor regime, Wet or Dry, which makes no distinction between competent and incompetent drinkers creates a legitimate grievance in one or another element of the population. The grievances so created are sufficiently important to account for the instability of Wet and Dry regimes alike. Prohibition wrongs those who know how to use liquor without abusing it, while anti-Prohibition, as at present proposed, wrongs those who suffer from the abuse of liquor. If everyone were temperate in the use of liquor, or if everyone injured his fellowmen by over-indulgence whenever given the chance, there would be an underlying rationality in the Wet and Dry regime which would sooner or later win general consent. The principle that men as drinkers are equal is as baneful a fiction as the notion that liquor can be "intoxicating" in itself, regardless of its use. Responsible drinking is the first step in making the distinction between men as drinkers. It is most easily conceived as a system

of law which depends primarily upon litigation for enforcement. And if there ensues a utilization of police power for the further protection of rights which litigation will have defined, then liquor control will be but following the beaten path marked out by the normal growth of every branch of jurisprudence.

The Hope of Ending Controversy.

If responsible drinking as a system of liquor control is to commend itself to the sound sense of the country, it must offer the prospect of quieting agitation on both sides, and of leaving the people free to devote their constructive political energies to more important matters. To accomplish this necessary stabilization, it must promise so effectively to put an end to grievances that the conscience of the country will accept its results. The psychic energy which is now given so prodigally to the campaign for and against Prohibition must be diverted to a more constructive channel, where well intentioned efforts will accomplish positive re-

sults, and give rise not merely to countervailing movements, so that the two forces cancel each other.

What are the existing grievances on both sides of the liquor question? They are divided into two classes: those arising from suffering directly experienced under the Dry regime on one hand or because of the saloon on the other and, second, those inflated grievances which are developed by both sides as part of the technique of political agitation, and which are magnified by the method of tracing indirect causal sequences. By making use of this method the most extravagantly evil consequences can be attributed to liquor on the one hand, and to Prohibition on the other.

Just as the Anti-Saloon League used to hold the saloon responsible every time a girl "went wrong," or a man deserted his family, or a family was reduced to poverty, or a boy went to jail, so now the Wets try to hold Prohibition responsible for these same things. The Wets declare that Prohibition is the cause of the crime wave and of racketeering, just as the Drys used to declare that

the saloon was the cause of crime and political corruption. Both types of complaint involve exaggerations which deprive them of all but propagandist value.

As typical illustrations of this tracing of indirect consequences it is worth analyzing two of the principal arguments of this type, one of the Wets, the other of the Drys.

The Wets claim that Prohibition has increased criminality. This is true, of course, to the extent that a new class of crimes has been created. But the idea that a general contempt for government and law has resulted from the Prohibition enforcement situation is an error in reading the thought of the people. There has already been occasion to explain (in Chapter III) the fact that people do not transfer their attitude toward Prohibition to other laws; they distinguish very consciously between the laws they respect and those they ignore. The racketeering technique, conspicuous as a means of discipline in the illicit liquor trade, actually evolved in the building trades before Pro-

hibition, and extends itself today to fields totally unconnected with liquor. Political corruption in the last few years has smelt at least as strongly of oil as of alcohol.

A typical prohibitionist "long-range" argument runs to the effect that liquor is incompatible with the Machine Age. This dictum has the same dogmatic appeal that attaches to Mr. McBride's view that Prohibition expresses the Divine Will. It is impossible to prove and difficult to test. But such tests as we have available throw doubt upon it. With respect to the relation of liquor and industrialization we have what we call a "control," namely, certain highly industrialized countries which permit liquor. The large scale economic phenomena, such as business cycles, trends toward consolidation, variations in price level, displacement of hand labor by machinery, or the phenomenon of over-production, manifest themselves in the different countries of the world without any notable correlation between prosperity and liquor regime.

In America itself, the areas which are most definitely committed to Prohibition, and in which the Prohibition regime has come to be most effective, are the very areas which are least touched by industrialization, namely the countryside and the small towns. The 1918 Wet-Dry map indicates clearly that the most highly industrialized areas were precisely the ones least willing to ban liquor. If industrialization compel Prohibition as its necessary consequence, and the liquor industry were a correlate of rural life, then we should expect to see the great urban industrial centers forcing Prohibition upon a reluctant and rebellious area of farms and villages as excise taxation was forced upon the mountaineers, or the industrial tariff on the middle western farmers. Henry Ford declares that the manufacture of automobiles is incompatible with a liquor regime, and Anti-Saloon League literature argues that the use of automobiles means Prohibition as its inevitable corollary. But actually Ford's foreign factories function without the aid of Prohibition, and the center of the automo-

bile trade is so far from being Dry at the present time that the Supreme Court, in *Carrol & Kiro vs. U. S.* (267 U. S. 132) took judicial notice of the fact that Detroit is "one of the most active centers of the illicit liquor trade," and the U. S. Circuit Court in a Detroit insurance case (*Lula Anders* v. *Title Guaranty and Casualty Co.*) ruled that a speakeasy is not a place of peril, and took judicial notice that "prohibition in law is not prohibition in fact" and that liquor is served "not only in blind pigs and kindred establishments, but that it is also at times illegally possessed, served and consumed in almost every sort of place where human beings foregather in the large cities of this country, with the exception possibly of religious edifices, court rooms, cemeteries, school-rooms, prisons, reformatories and W. C. T. U. headquarters."

These arguments, intended to establish the indirect evils of the saloon or of Prohibition, belong at the present state of our knowledge to the domain of rhetoric rather than to the domain of science. They contain an intrinsic fallacy which

in social thinking is the mark of the crank and the agitator. They assume that there is only one significant variable in the total social and economic situation, and that all changes can be referred back to that variable. Of course, the fact is that organized society shows a multiplicity of variables and a reciprocity of causes and effects. For this very reason the crank can always establish a connection between his own little pet cause and a great budget of vast effects. The same thing will be treated by one agitator as a cause, by another as an effect. The Prohibitionist says abuse of liquor causes poverty; the socialist says poverty causes the abuse of liquor. Both are right. One reformer will ascribe all significant evils to capitalism, another will attribute them to irreligion, another will maintain that they result from immigration, others will blame them upon defects of the educational system. It is because the forces at play in society are so infinitely interrelated that cranks are able to make out plausible cases for the wide ramification of some particular evil which

seems to them of transcendent importance.

But when they come to evaluate results of their pet reform, they forget the complexity of this interrelation of forces in society. The prohibitionist argument that prosperity is due to Prohibition carries to the limit of absurdity this ridiculous parody of science. Speculation as to the indirect grievances arising out of Prohibition, or resulting from the liquor traffic, is not sufficiently well grounded in exact information to make it worthy of consideration as a basis for sound statesmanship.

But with direct damages it is otherwise. No speculative theses are required to prove that the man who is in jail on a Prohibition conviction is a criminal because of Prohibition; no far-fetched analogies or strained statistics are needed to demonstrate that the man who wants good liquor, and gets poisoned liquor, bad liquor, or no liquor, is directly affected by the Dry regime. No devious chains of causation need be traced in order to show that a wife whose husband is squandering

in a saloon the money needed by his family (and any individuals injured in comparable ways) has a direct and legitimate grievance against the liquor industry. If we can contrive a regime which will allay these direct, individual grievances against Prohibition on one hand and the saloon on the other, the indirect and speculative grievances would probably be insufficient to maintain a political cause.

It is a peculiarity of the Prohibition regime that it seems to be concerned much more definitely with the indirect than with the direct grievances arising from the liquor problem.

What can the regime offer to meet the complaints of the moderate drinker? It can only express the hope that it can educate him toward total abstinence. If it could so educate him, the grievance would disappear. But the argument against moderate drinking cannot make its way against the resistance offered. The attempt is made to prove that moderate drinking is harmful to the drinker, but it is impossible to make out a

conclusive case to this end except by ignoring the aesthetic side of life. There is also cited the exhortation to self-sacrifice according to the teaching of St. Paul that "if meat causeth my brother to offend I will eat no flesh while the world standeth lest it cause my brother to offend." But there is not enough of the saintly spirit in America to make the benevolent program of St. Paul a practicable one. The argument that total abstinence is imposed by the Machine Age, and not by the whim of faction or party, is ineffective, because the Machine Age itself delivers its verdict ambiguously. It puts its slaves to a nervous strain which, for all we know, may create an urgent need for strong stimulants, artificiality in the environment calling for artificiality in the diet. It may be that this nervous strain, which the bucolic peasants do not know, accounts for the stubborn resistance which liquor offers to the efforts made to eradicate it from the cities, where the seal of the Machine is most definitely set upon life. Neither the argument for self-interest, nor the

argument for charity, nor the argument of inevitability can be quite conclusively made out. But as long as the moderate drinker remains unpersuaded, his grievance will persist, and the Prohibition regime will rest upon the principle of constraint, lacking the free consent of those whose conduct it modifies.

If the direct grievances of the moderate drinker remain outstanding under Prohibition, what is to be said of the direct complaints of those who are injured by the liquor industry? An example of the kind of satisfaction which the sufferers from liquor get under Prohibition is given in a monograph published by Prohibition Commissioner Doran on June 1, 1930, explaining the difficulties of enforcement in cities. It appears from his statement that in New York "there come to the Prohibition administrator's office daily many complaints made by citizens of liquor-law violations and the resulting nuisances . . . they are investigated by the Federal investigators as rapidly as possible. There are only eight investigators in

the local office, and much of their time is spent on the larger phases of the work." The following is a sample of the letters sent to the Prohibition Administrator:

Dec. 28, 1929.

DEAR SIR:

I am notifying you of a place at [address withheld], between Second and Third avenue. The name of the owner is .....; he also has a partner, but I can't recall his name. In this place he keeps a boarding house and a gambling house.

He has thirty barrels of whisky and he has a cellar rented right up next to the store at .... East Thirty-Ninth St. where he keeps the wine. He sells this wine to the men that go there. The whisky he keeps in the kitchen in the closets and other places.

He was arrested and put under bail once before for keeping this speakeasy, but that doesn't seem to bother him at all. When you go there do not let him bulldoze you about this place. I know what is going on, as I am a married woman with five children and he takes my husband away from home so as to go there and gamble his pay and drink.

So I made up my mind that this had to stop, as

> I can hardly afford to buy a piece of bread for my children. He sells wine and whisky from morning till night. . . .[1]

This is not an unusual situation under the present regime. It is exactly the condition that Prohibition was intended to prevent, but by extreme indirection. Of the 168 men on the New York Prohibition Administrator's force, the great majority are at work trying to stop large scale operations in liquor, some of which is destined to be used without damaging any innocent parties, and some of which is going into "joints" such as the one described in this letter. What direct remedy does this poor woman have? The administrator turns a photostat copy of her complaint over to the New York City police. The police department returns it to him without comment, and takes no action. His eight investigators may ultimately be able to spare enough time from other work to make this investigation. They may arrest the owner and his partner once more, and put him "under bail," but there will still be doubt whether it "will

[1] See *New York Times*, June 1, 1930.

seem to bother him at all." If they jail him, seize his liquor and close the speakeasy, the complainant's husband will have no difficulty in finding another speakeasy in the same block. To remedy this grievance by the Prohibition method you must dry up New York, and even then you are giving the sufferer no indemnity for her wrongs. Prohibition is a policy of all or nothing.

If liquor control legislation had developed along the line of responsible drinking, this woman could appeal to some legal aid society, or make an arrangement with a lawyer, even a shyster or an ambulance chaser, and then, on the facts as given above, obtain from the owner of the speakeasy, or his partner, or the proprietor of the premises upon which it is situated, or as a last resort from the indemnity fund of the New York liquor industry, enough money to buy bread for her five children for a year.

Incredibly, the Prohibition leaders have never sought to organize effective relief on the litigation level. The slur which Emmet McBride cast upon his brother, F. Scott McBride of the Anti-Saloon

League, "He has no lively conscience against the evils of the liquor traffic and *little heart interest for those who suffer from drink*," [1] characterizes the result if not the intention, of the Prohibition policy itself. The policy reaches out toward distant and obscure objectives, not being concerned with the objects which are more immediate and clearer. It seeks to remedy indirect and far-fetched evils, and leaves the direct, individual grievances without a remedy. This fact accounts for the exasperation of those who complain, seemingly against their real interests as drinkers, that they object to Prohibition because it doesn't prohibit. Neither the grievances of the moderate drinkers nor of the sufferers from intemperance are allayed by the Prohibition system. Under the system of responsible drinking the moderate drinkers would be satisfied at once, and those injured by liquor would be able to obtain a focussing of attention upon their interests and adequate indemnities for their injuries.

[1] *New York Times*, June 1, 1930.

Reforming the Prohibitionist.

Responsible drinking, by its sheer directness and simplicity, offers a prospect of ending the immediate evils of drink. This is the *sine qua non* of any adequate liquor policy. The failure to meet this requirement condemns alike National Prohibition and the anti-Prohibition policies which are opposed to it. But would the elimination of the direct evils of drink end the Prohibition agitation? Is the Dry movement sufficiently a product of reason that it can be expected to die down when its reasonable demands are met? If it has enough psychological momentum it can run on without the impulsion of a serious grievance against liquor. The passions inherited from its own history may be sufficient to stimulate it from within even when no open saloons stand at the street corners to stimulate it from without. It may continue to incite agitation over phrases and slogans even when the phrases have become hollow and the slogans out of date. There are some as-

pects of the Prohibition movement which must be explained and controlled psychologically rather than logically. The existence of the movement is a psychological fact, to be taken into account quite independently of the just grievances out of which it arose. Therefore, a liquor control scheme which would end liquor agitation and put the whole question on the shelf must do more than reform the drinker and the dealer; it must reform the prohibitionist as well.

What is meant by reforming a Prohibitionist? Merely to cause him to drink is not to reform him. It is plausibly asserted that many prohibitionists are already clandestine drinkers. The attempt to bring them to change their public profession would only stir up needless and bitter opposition. Equally vain would be the attempt to bring them to assume a broad attitude of tolerance. It is just as hard to get the Prohibitionist to imitate the tolerance of Jesus as it is to get the moderate drinkers to imitate the self-sacrificing abstinence of St. Paul. The true attitude of tolerance is something in the fibre

of a personality that is not easily counterfeited under the pressure of persuasion. To reform the Prohibitionists is not to annihilate them; their characteristic antipathy and intolerance may remain with them. But this attitude may be redirected, and the corresponding energies rechanneled, so that they are more constructively engaged than at present. It is one of the curious qualities of the scheme of responsible drinking that it invites this redirection of the psychic force of Prohibitionism by offering to the anti-liquor campaigners important and remunerative posts in the liquor control scheme.

For there is room in the system of responsible drinking for strong anti-liquor associations which will make it their business to help sufferers from drink in litigation against the liquor industry. Such associations might well be exempted from the law of barretry and permitted to solicit business. The connection of the organization with the government might continue to be no less intimate than it is at present, but with this difference: whereas

the Anti-Saloon League at present spends its time bedeviling legislators, and tries to control the government, in the future it would spend its time attacking actual wrongdoers, and trying to serve the government. The organized anti-liquor forces should be invited to aid in the drive to make the liquor industry pay every cent of its debts. The resulting disposition of forces would be in harmony with present tendencies in government, would be helpful to those who are most in need of help, and attractive to those who must be attracted away from Prohibition campaigning if the liquor controversy is to be ended.

The place of a special protective association in the field of liquor control is marked out for it by the general development of the so-called functional organization of society, which tends to replace the omni-competent local or territorial community with a whole array of specialized associations. These groups into which are organized men of like mind or like interest over the whole national area appear in our political life not only

as the sources of pressure in lobbying, and in the making of rules or setting of standards which have within the association the force of law, but also as the commissioned enforcers of one or another part of the general legal system. The Society for the Prevention of Cruelty to Animals, the Watch and Ward Society, the American Civil Liberties Union, are conspicuous instances of a type of organization which is becoming more and more common in government. The modern police force is itself highly specialized, with its traffic squad, which cooperates with the Automobile Association, and its homicide squad, which cooperates with the gangsters. It would not greatly strain our imagination to picture a regime in which the duty of preserving and enforcing the whole legal system of the country would be divided on the basis of interests rather than on a local and territorial basis.

This type of activity could be made irresistibly attractive to the paid personnel of the Anti-Saloon and Prohibition organizations. It would be a

lucrative type of social work, involving ample opportunities for entering into the affairs of other people, and for inducing others to adopt one's own standard of conduct. The administration of drinking permits would make it possible for the Anti-Liquor Organization to invoke directly against city drunkards the kind of individual surveillance which under present conditions is effective only in the small towns. The law controlling the dealers would be enforced, like most civil laws, at the expense of the dealers themselves. The consequent contact with a definite source of income of this character would not appear to the professional agitators as a drawback, but might even seem to be an advantage.

While the anti-liquor group would be able to strike much more effectively than at present at noxious uses of liquor, it would have a benign as well as a grim aspect. For, as a part of its ordinary routine of business, it would be a Lady Bountiful. It would dispense charity at the expense of its enemy, the liquor industry, thus win-

ning friends with subsidies taken from its foes. In the charity system of the modern city it would fill a long-felt want: it would be the only charitable organization which would prefer the undeserving to the deserving poor. Wives such as those who under the present system can appeal only to have speakeasies closed could then obtain tangible and adequate protection for their rights. By the time the Prohibition movement had lost those of its members who were concerned about the real, and not the fanciful evils of drink, and had then suffered the further loss of those who would be drawn into the new type of liquor control work, there would not be enough membership left to maintain a significant agitation. Prohibition, with its reasonable followers converted away from it, and its prejudiced followers diverted to another use of their passions, would be no more effective a disturbing factor in the political system than vegetarianism of today.

It is not unreasonable to look forward to an equally significant redirection of energy on the

part of the drinker. The moderate drinkers have great responsibilities which they will be in a position to fulfil only when the crude protection of the right to drink no longer occupies the forefront of their thought. There are accessible in contemporary America many elements which can be combined to give liquor a place of beauty and dignity in American civilization, comparable to that which wine holds in the better circles of French society. The avoidance of inebriety—the supreme aim of temperance movements—is only the beginning of the discipline which invites development. Never was there a society more sensitive than American society of today to leadership in matters of taste and form. Never was there a continent more thoroughly equipped with the apparatus of cultural contact—radio, magazine, newspaper and movie. There is an evident yearning toward improving the tone of life, evidenced by the unparalleled college enrollment at one end of the scale, and by the success of snob advertising at the other. Much of the leadership that America receives in matters

of taste and art is far below the level to which the people are entitled by their energy and enthusiasm for new and good things. When we have banished liquor as a problem of politics, we will receive it back as a problem of art, a thing to be fitted to the ritual and rhythm of our national life. I do not doubt that in this enterprise adequate leadership will be found, and sane attitudes toward liquor will come to prevail.